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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 111

MAX SCHAFFER AND NORMAN SCHAFFER,
PETITIONERS,

vs.

UNITED STATES OF AMERICA.

No. 122

HYMAN KARP AND BENJAMIN T. MARCO,
PETITIONERS,

vs.

UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 111 PETITION FOR CERTIORARI FILED JUNE 11, 1959
NO. 122 PETITION FOR CERTIORARI FILED JUNE 17, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 111

MAX SCHAFFER AND NORMAN SCHAFFER,
PETITIONERS,

vs.

UNITED STATES OF AMERICA.

No. 122

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PETITIONERS,

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ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

—vs.—

MAX SCHAFFER, NORMAN SCHAFFER, HYMAN KARP and BENJAMIN T. MARCO, Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Appendix of Appellants Karp and Marco—Filed October 8, 1958

[fol. b]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM DEFENSE SUMMATION IN BEHALF OF DEFENDANT KARP

* * * * * * *

Now, I want to talk to you about the evidence in the case. I am a little hampered in that, because it is hard for me to keep all the evidence in mind. This trial of over two weeks has had a great number of witnesses. We have had over 230 exhibits introduced by the Government, many of them multi-page exhibits.

We have had over a score of exhibits introduced on behalf of the defense, many of them multi-page exhibits, and although they were all offered originally and received against a specific defendant and subject to connection against the others, now the case is in a posture before you where his Honor has dismissed the conspiracy charges. I believe his Honor will tell you at the proper time what

the effect of that is with regard to the evidence. In other words, if five or ten or twenty exhibits, say, those coats, for instance, were introduced here in evidence, and a conspiracy charge has failed, those have no weight, no bearing, no relevancy to the man I represent. Similarly, you heard evidence from various people from Bluefield, West Virginia and about Bluefield, West Virginia. Those have no relevance, no weight, no bearing whatsoever on Mr. Karp.

Now, you as human beings, just as I am a trained lawyer, who for many years made it his business to try to separate things into their proper category, successfully or unsuccessfully, you have a great burden in trying to rid your mind of the evidence which does not apply to Mr. Karp. Similarly, you have similar burdens with the other defendants. But that is the way this case has developed, and we are faced with that problem, and there is nothing we can do about it, except to do our best.

[fol. c] So in talking to you about the evidence, I must now restrict myself to that evidence which has been admitted against Mr. Karp, which is, in the final analysis now, under his Honor's ruling which will be made tomorrow, that which you may consider against him, and you may not consider anything else against him.

Now, no one is going to look into your mind. No one is going to be able to tell you whether you did right or wrong. But you have your conscience and your oath as jurors to guide you, and to insist in so far as it is humanly possible you must do that difficult task.

Now, as I see the evidence against Mr. Karp, stripping away all that which is not relevant to him, such as these coats and these files, which don't bear on him, these files which bear on Mr. Schaffer and Mr. Mareo, it comes down to two categories. The first category comes from what I call a tainted source, Anthony Stracuzza, and the second category comes from a non-tainted source, principally, the FBI.

. . . . . .

Stracuzza, we offer you, is a liar, a perjurer, a thief, a self-admitted thief, a loan shark, a faithless employee—

everything you will. He sat there in that chair and he raised his right hand and swore to God that he was going to tell us the truth. That was his oath, an oath with some significance, ladies and gentlemen, both historically, religiously, and as a matter of law, has certain consequences.

Stracuzza, I offer to you, is a witness who has made his peace with the Government, and who is determined to help the Government in any way he could, because that is the way he is going to help himself and his wife and his brother. [fol. d] You will recall that on the 28th day of July, when the Government arrested the occupants of that room on the fourth floor, they found in it Tony, the witness, his wife, Dorothy—they were both arrested. And shortly thereafter they arrested his brother, Mario.

Now, a case is important from two aspects, and evidence is important from two aspects. One, what was produced to you so that it could meet the test of cross-examination, so that the lies could be exposed and confronted, so that it could be torn down? The Government produced Tony, and he got that treatment. And it is equally important for what was not produced to you.

Where were Mario and Dorothy in this case?

Mr. Moran: I object to this, your Honor.

The Court: Well, the jury can make whatever inferences they want, subject to the law as I will explain it.

Mr. Steinberg: I say, where were Mario and Dorothy?

Mr. Moran will stand up and say to you when his turn comes, why didn't we call them? I have a power of subpoena. All I have to do is get a subpoena from a clerk, give it to a process server, serve it and bring him here.

Do I want to vouch for the credibility of those witnesses? Do I want to put on the wife and the brother of Tony, two people under indictment in this case? Do I want to let Mr. Moran "cross-examine" him? Because the party that calls him, can't cross-examine him; it is the other party that cross-examines. Or do I want to sit back and wait for him to fulfill his burden, the burden imposed on him by law, to prove his case beyond a reasonable doubt, to bring the witnesses that he should bring, and that I should have the right to cross-examine as a hostile witness? That is the purpose of cross-examination.

Did you see Dorothy come here at the behest of the Government? Did you see Mario come here at the behest of the Government? Is that a hole in the case? What [fol. e] could they have added to this case? What could they have told you that would help you come to a proper determination on the evidence? What could they have told you that would have aided you to find where the truth lay in this case?

Let's see what they could have told you.

Dorothy, you will recall, according to Stracuzza, the husband, was a lady with the interesting habit of using two names, Dorothy Stracuzza—first name is Dorothy; last name, married name, is Stracuzza—and Lillian Schafler. He said Lillian was the name she sometimes used, and Schafler was her maiden name, although I think she spelled it a little differently than appeared on the door. That would be something I would like to ask her about on cross-examination.

Similarly, Dorothy was indicted in this case as a defendant. But before the trial the District Attorney severed the case, which means that she doesn't go on trial, and he admitted to you that in a previous indictment involving the three Stracuzzas and some thieves, he similarly severed the case, so she didn't have to appear here.

That is a nice way to treat a lady—don't put her to any inconvenience. You don't put her on trial; you don't try her for the crimes she may be charged with by the grand jury; and when you don't call her to the witness stand, she is not cross-examined by these nasty defense lawyers, who want to ask embarrassing questions.

You have a right and a duty to consider why Dorothy wasn't there.

Did Dorothy know that these items of merchandise were stolen? What would she have said if she had been asked under oath did she know?

You heard what her husband said. I asked him under oath, "Did your wife know?"

And he hedged, finally he said, "No, she didn't know." [fol. f] But when I confronted him with testimony at the previous trial, he said he would be safe to say she did know it, but his final answer was that she didn't know.

Is that one of the benefits that accrues to a witness for the Government in this case, to have his wife tenuously dealt with?

What other benefits accrue to such a witness? He himself testified, you will recall, that he was indicted not only in this case; in which he pleaded guilty shortly before the trial—and that was another revealing little incident—he pleaded guilty to this late in the afternoon, before his Honor, in a civil part, and he was brought out and he pleaded guilty, and he is still awaiting sentence, and that sentence has been adjourned several times at the behest of the Government; he hasn't been sentenced, and he pleaded guilty in the other case, and he hasn't been sentenced.

Why hasn't he been sentenced, ladies and gentlemen?

Incidentally, Mario got the same treatment on the same occasion, at the same time. He came in, pleaded guilty to this indictment, pleaded guilty to the other indictment, and he hasn't been sentenced.

Why haven't they been sentenced, ladies and gentlemen? Is it because when you have a prospective witness and the sword of Damocles hangs over his head, it is then the power of the Assistant District Attorney to make a recommendation to the Court? Is it because when a witness has hanging over him the possibility of going to jail, that he bestirs himself a little more on behalf of the side that has that power?

I have no power to do anything here. I have no power to make recommendations to the Court. I won't be heard. But he has the power.

So you have Dorothy treated in what I think is a fair statement, rather tenderly. You have Mario, the man who, [fol. g] according to his brother, went out with a thousand dollars in cash every day and came back with boxes. Mario is not even produced to you so I could cross-examine him. And the District Attorney will say to you, why don't I call him? Am I going to vouch for that Mario? Do I have any power over him?

So they aren't in the case, they aren't here to shed any light in the case, they aren't here to help you find the truth.

So we have to do the best we can. We then have to rely on Tony, because that is the one they produced.

Now, Tony, as you remember, was a man who swore to tell the truth. If you heard him for several days you must, with your common sense, with your insight, with your experience as human beings, with your experience in dealing every day with people who try to sell you things, people who try to put something over on you, your experience with separating truth from lies, weigh the motives of that man and listen to what he said, and say to yourselves, was he trying to fool me? Was he trying to help me find the truth? Or was he acting a part, designed to help him, his worthless brother and his wife avoid the consequences of what they richly deserved? What was his object here?

You know, one of the strangest things I ever had in a case in my life developed here. Tony would testify very glibly and very quickly about everything, and then on cross-examination he gave answers, and it wasn't until we confronted him with some[illegible]ng that some explanation was forthcoming, and when he got in a hole he would say, "You want me to t[illegible] you about that, counsel? You want me to tell you the [illegible]e story?"

Was he [illegible]xious to give me the whole story, or was he anxious to tap another nail into this man's coffin, to help him?

[fol. h] Remember Tony said on his direct examination that he had nothing to do with the operations prior to a certain date of Berk and Eisenberg—he had absolutely nothing to do with it; that he never had anything to do with the proceeds of the checks. It just happened that I had some checks here, because Mr. Karp was in the habit of keeping all his checks in the regular course of business for his accountant, and I said to him, "How does it happen that in January 1952,"—January 1952, long before he said he ever got any money from Karp, and long before he had anything to do with the finances of these other men—"that the names Dorothy Stracuzza and Lillian Schafler"—spelt (sic) S-c-h-a-f-l-e-r, before they opened the Schafler office—"appeared on the backs of these checks?"

I thought I was contradicting him just on his statement on direct.

He said there was a certain date here, long before I wanted to know why—this was the purpose of cross-examination—and I was amazed; because he had admitted that he was a loan shark; he admitted that he was in a criminal enterprise of lending money at usurious rates; and that he would get an extra hundred dollars for lending a thousand; that he was financing this operation to that extent.

I was stunned; I was amazed. I didn't know that when I asked him that.

What kind of a man are we dealing with? Here is a young man, working as a truckman. The most he made at that time, I think he said, was $70 a week. He has a house—and the amusing thing to me, the house address is "Straight Path"—has a house on Straight Path—although I could think of other names that might be more appropriate—has two cars; he has enough money to go into the loan shark business; and his wife has money in several savings accounts in different names, at a time when he was [fol. i] working as a truckman, and at a time when he says under oath to you that he wasn't stealing from his boss.

Do you believe that?

Now, his Honor will charge you at the appropriate time there is an old maxim, "falsus in uno, falsus in omnibus"—false in one thing, false in everything.

You, according to his Honor's instructions, will be able to find that where a man wilfully and wrongfully and intentionally lies to you about a material fact in a case, you have a right to disregard his entire testimony.

That was one point where he lied.

When did he start stealing? Or how did he account for this wealth?

This business about his stealing, by the way, is very interesting, because although he says he made his peace with the Government at a certain time, he wanted to unburden himself, he wanted to suffer the mental relaxation that comes from telling the truth, and he went to the FBI in September 21, 1953, and threw in his lot with the Government and became a man who wanted to uncover the truth, shortly before this trial he was caught stealing a package—this was after he was cooperating with the Government, while he was preparing to testify in this case—he

was caught stealing a package from a truck, and pleaded guilty.

And what happened to this man? Here is a man who, according to his own testimony, a thousand dollars a day of crooks' prices, stolen goods, a thousand dollars—$5,000 a week less than half value of stolen goods. So let's say that that is about $12,000 a week, day in and day out. He is in the business of stealing and selling, according to him, stolen merchandise.

Here is a man—let's see, $12,000 a week—over a half a million dollars a year, on a yearly basis, and this man, when he is caught as recently as he was caught, what hap-
[fol. j] pened to him? He got a suspended sentence. He got a suspended sentence on the recommendation of a District Attorney who sits here. The Judge gave him a suspended sentence.

Now, that is nice treatment; that is nice treatment, and something anybody in his right mind would want, and it sheds a little more light on Mr. Stracuzza and his motives in testifying, and the weight you can give his testimony, and whether he was here to help you arrive at the truth, or whether he was here to fool you, to do anything he could so that he'd get his 30 pieces of silver.

. . . . . .

[fol. k]

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM GOVERNMENT SUMMATION

Before I begin my summary, however, I wish to address myself, in the way of making a few comments as to some of the remarks that were made in the course of the summations by the defense counsel this morning.

There were allusions from time to time, or suggestions, if you will, as to why the Government had not called certain persons as witnesses, so that they could be subjected to cross-examination by the defense counsel. Two of the names that were prominently mentioned were Mario Stracuzza and Dorothy Stracuzza.

As you recall, during the course of the trial Dorothy Stracuzza, as was indicated, the Government's case against her pertaining to the two indictments that these defendants were brought to trial on, she was severed; she is still a defendant in this court. The charges are still open against her. They have not been dismissed in any way.

As to the other defendant, Mario Stracuzza, it is the Government's representation to you that he could have offered nothing in the way of additional evidence that was not presented to you through his brother. Because if you will recall from the testimony of Agent Miller, both Stracuzzas were interviewed on each and every occasion by him, their story, their testimony, if you will, given to the FBI, was a joint story, and therefore, the testimony of Mario Stracuzza, if he were called to testify, would be in a sense of repetition of all the details that you heard through the witness Anthony Stracuzza.

Furthermore, the Government is not required to call any witness if we believe that there is nothing further that that witness can contribute in the search for the truth.

As Mr. Steinberg told you, and as I will say to you now, he had an opportunity to bring Mario Stracuzza to the witness stand. He also had an opportunity to bring Dorothy Stracuzza to the witness stand. He did not do so for reasons best known to himself.

[fol. 1] Now, in making these comments as to the conduct of the prosecution, there were some criticism as to the extent that the Government failed in its obligation to its citizens to bring out all the facts. I say to you as an assistant United States attorney, my job is not to convict people, but is to bring them here in court, give them a fair chance to meet the charges that the Government has presented against them.

The motto on the building of the Department of Justice in Washington I think fairly indicates the attitude of the Government, as far as its citizens are concerned. It reads:

> "The Government wins when justice is done its citizens in the court."

Now, of course, if you believe that the Government has in some way or other prevented you from getting the full

truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march right into that jury-room and acquit everyone of these defendants.

Mr. Steinberg: May I approach the Bench for a moment, please?

The Court: No, you have to say it in public, counsel.

Mr. Steinberg: I respectfully move for the withdrawal of a juror on that remark, as an improper remark.

The Court: I will deny it. You may have an exception.

Mr. Steinberg: Exception.

• • • • • • • •

[fol. m]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C 145-232

UNITED STATES OF AMERICA,

—v.—

DOROTHY STRACUZZA, Defendant.

NOLLE PROSEQUI ENTERED BY GOVERNMENT IN CASE OF DOROTHY STRACUZZA

The filing of this nolle prosequi will dispose of the Government's case against the defendant Dorothy Stracuzza.

Indictment C 145-232 was filed on October 20, 1954. The indictment consist of four counts and names as defendants Anthony Stracuzza, Mario Stracuzza, Dorothy Stracuzza, Max Schaffer, Norman Schaffer, Benjamin T. Marco and Hyman Karp. Count 1 of the indictment charges that the Stracuzzas and Max and Norman Schaffer unlawfully, wilfully ~~and knowingly~~ transported and caused to be transported in interstate commerce, to wit, from the Southern District of New York to Lebanon, Pennsylvania ladies and children's wearing apparel of a value in excess of $5,000,

knowing the same to have been stolen and converted (Title 18, United States Code, Sections 2314, 2) during the period from on or about May 13, 1953 up to and including July 27, 1953. Count 2 of the indictment charges a similar offense by the Stracuzzas and Benjamin T. Marco from the Southern District of New York to Bluefield, West Virginia during the period from on or about June 11, 1953 up to [fol.n] and including July 27, 1953. Count 3 charges a similar offense by the Stracuzzas and Hyman Karp from the Southern District of New York to Fall River, Massachusetts during the period from on or about May 21, 1953 up to and including July 27, 1953. Count 4 of the indictment charges a conspiracy on the part of all the defendants to violate Section 2314 of Title 18, United States Code during the period from on or about September 1, 1952 until the date of the filing of the indictment. (Title 18, United States Code, §371.)

Anthony and Mario Stracuzza pleaded guilty to all counts of the indictment and received a sentence of five years, the sentence on each count to run concurrently with one another and with the sentences imposed on Indictments C 145-233 and C 145-234, the execution of the sentence on each indictment was suspended and the defendants placed on probation for a period of five years. The remaining defendants, namely Max Schaffer, Norman Schaffer, Benjamin T. Marco and Hyman Karp were convicted for the substantive violation charged in the indictment but were acquitted on the conspiracy count, the Court having dismissed Count 4 at the conclusion of the Government's case. An appeal from the conviction has been made by the defendants Max Schaffer, Norman Schaffer, Benjamin T. Marco and Hyman Karp.

The defendant Dorothy Stracuzza is the wife of the co-defendant Anthony Stracuzza and the sister-in-law of the defendant Mario Stracuzza. She is named as a defendant in all four counts of Indictment C 145-232, and is also named as a defendant in Indictments C 145-233 and C 145-234. During the months of June and July 1953 Dorothy Stracuzza assisted her husband Anthony Stracuzza in keeping the records of A. Schafler at 48 West 25th Street, New York City, which was the business name under which

the Stracuzzas conducted their dealings in stolen merchan- [fol. o] dise with the co-defendants Max Schaffer, Norman Schaffer, Benjamin T. Marco and Hyman Karp.

Dorothy Stracuzza has admitted assisting her husband in this business but has denied that she had knowledge of the fact that the merchandise handled by her husband was stolen. The defendant Anthony Stracuzza in his testimony as a witness for the Government at the trial of Max Schaffer et al., stated that his wife Dorothy Stracuzza never knew the extent of his operations and that he never told her that he was dealing in stolen merchandise.

In view of these facts, it is recommended that a nolle prosequi be filed as to the defendant Dorothy Stracuzza on Indictment C 145-232.

Dated: New York, July 28th, 1958.

John T. Moran, Jr., Assistant United States Attorney.

In view of the foregoing recommendation, I hereby direct, with leave of the Court, that an order of nolle prosequi be filed herein as to the defendant Dorothy Stracuzza on Indictment C 145-232.

Dated: New York, July 29, 1958.

Arthur H. Christy, United States Attorney

[fol. p]

In United States District Court
For the Southern District of New York

No. Cr. 145-232

United States of America

—v.—

Hyman Karp

Judgment and Commitment—June 3, 1958

On this 3rd day of June, 1958 came the attorney for the government and the defendant appeared in person and by counsel,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury, of the offense of unlawfully, wilfully and knowingly transporting and causing to be transported in interstate commerce, goods valued in excess of $5000. knowing the same to have been stolen and converted. (Title 18, Secs. 2314 and 2 USC) as charged in count 3 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

[fol. q] It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

on count 3—Two Years and fined $10,000. and to stand committed until fine is paid or he is otherwise discharged according to law.
Bail continued pending appeal.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Thomas F. Murphy, United States District Judge.
Herbert A. Charlson, Clerk.

[fol. r]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. Cr 145-232

UNITED STATES OF AMERICA

—v.—

BENJAMIN T. MARCO

JUDGMENT AND COMMITMENT—June 3, 1958

On this 3rd day of June, 1958 came the attorney for the government and the defendant appeared in person and by counsel,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury, of the offense of unlawfully, wilfully and knowingly transporting and causing to be transported in interstate commerce, goods valued in excess of $5000. knowing the same to have been stolen and converted. (Title 18, Secs. 2314 and 2 USC.) as charged in count two and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

[fol. s] It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count two—Four (4) Years and fined $10,000. and to stand committed until fine is paid or he is otherwise discharged according to law.
Bail continued pending appeal.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Thomas F. Murphy, United States District Judge.
Herbert A. Charlson, Clerk.

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

MAX SCHAFFER, NORMAN SCHAFFER,
BENJAMIN T. MARCO, HYMAN KARP,

Defendants-Appellants,

ANTHONY STRACUZZA, MARIO STRACUZZA,
DOROTHY STRACUZZA,

Defendants.

ON APPEAL FROM THE JUDGMENTS OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX TO BRIEF OF APPELLANTS MAX SCHAFFER AND NORMAN SCHAFFER

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APPELLANTS' APPENDIX.

APPROPRIATE DOCKET ENTRIES.

10-20-54. Filed indictment.

1-14-54. Filed complaint dated 7-28-53, temporary commitments for Anthony Stracuzza, Mario Stracuzza and Dorothy Stracuzza, Notice of appearance by Raymond L. Wilkes, Atty., 233 Bway NYC for defts. Stracuzza. Bail bonds for Anthony Stracuzza $10,000; Mario Stracuzza $15,000; Dorothy Stracuzza $7500; Marie Stracuzza $2500, dated 7-29-53. Mfrs. Cas. Ins. Co.

10-22-54. Filed notice of appearance by Irving W. Coleman, 1820 Main St., Northampton, Pa. Atty for Max Schaffer and Norman Schaffer. Bernard L. Buskin, co-counsel, 24 W. 40th St., NYC.

10-26-54. Filed Notice of Appearance—Harris B. Steinberg, 25 Broad St., NYC, Atty for Deft Hyman Karp.

10-29-54. Anthony Stracuzza, Mario Stracuzza and Dorothy Stracuzza plead not guilty. Released on own recognizance. See C 145-234 for bail. RYAN, J. Hyman Karp pleads not guilty. Bail cont'd. Deft. ordered fingerprinted. Benjamin T. Marco pleads not guilty. Bail continued. Defts. allowed 10 days for motions. RYAN, J.

10-29-54. Filed notice of appearance by Jerome Katz, P.O. Box 234 Bluefield West Va. Paul Rutheiser, 36 W 44th St. NYC co-counsel for deft. Marco.

11- 9-54. Max Schaffer pleads not guilty—bail $5000. Norman Schaffer pleads not guilty—bail $5000.

1-15-58. Filed affidavit and notice of motion for an order dismissing indictment and for a separate trial as to deft. Hyman Karp. (Argued Dec. reserved, 1-20-58). DAWSON, J.

1-20-58. Filed memorandum #24057 by DAWSON, J. Motion by defts. Max Schaffer, Norman Schaffer, Benjamin T. Marco and Hyman Karp to dismiss indictment and motion by deft. Karp for a severance are denied. So ordered.

1-20-58. Filed government's affidavit in opposition.

3-14-58. Anthony Stracuzza and Mario Stracuzza plead guilty, Atty present. Sentences adjd until after trial of co-defendants. Released on own. recognizance. MURPHY, J.

4-21-58. This indictment consolidated with Cr 145-233 for purposes of trial. Trial as to Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco begun before MURPHY, J. and a jury.

4-30-58. Trial cont'd on Apr. 22, 23, 24, 25, 28, 29. Govt rests Defts. move to dismiss indictment, and all counts. Granted as to count 4, and decision reserved as to counts 1, 2 and 3.

5- 6-58. Defts. renew motion for judgment of acquittal and for new trial. Decision reserved. Bail for all defendants continued. Probation report ordered on all defts. Sentencing of all defendants adjourned to 6-3-58. MURPHY, J.

6- 3-58. Filed Judgment #62,237 NORMAN SCHAFFER—Count one Two (2) YEARS, at a place of confinement to be designated by the atty gen'l of the U.S. and fined $10,000. and to stand committed until fine is paid or he is otherwise discharged according to law. Bail continued pending appeal.

6- 3-58. Filed Judgment #62,238 MAX SCHAFFER—Count one Two (2) YEARS, at a place of confinement to be designated by the Atty Gen'l of the U.S. and fined $10,000. and to stand committed until fine is paid or he is otherwise discharged according to law. Bail continued pending appeal.

6- 3-58. MARIO STRACUZZA—FIVE (5) YEARS on each of counts 1-2-3-4 to run concurrently with each other and concurrently with sentences imposed this day on indictments Cr 145-233 and Cr 145-234. Execution of sentence suspended, probation for FIVE YEARS, subject to the standing probation order of this court.

6- 3-58. ANTHONY STRACUZZA—FIVE YEARS on each of counts 1-2-3-4 to run concurrently with each other and concurrently with sentences imposed this day on indictments Cr. 145-233 and Cr 145-234. Execution of sentence suspended, probation for FIVE YEARS, subject to the standing probation order of this court.

6- 3-58. Filed notice of appeal as to deft Norman Schaffer.

6- 3-58. Filed notice of appeal as to deft Max Schaffer.

6-11-58. Filed stipulation that indictment Cr. 145-233 and docket entries relative thereto shall be part of the record on appeal from conviction in this case.

7- 3-58. Filed order that the time of each of the defendants herein to file and docket the record on appeal, be and it hereby is extended to 9-11-58. Edelstein, J.

7-16-58. Filed transcript of record of proceedings dated April 21, 22, 23, 24, 25, 28, 29, 30, May 1, 1958, June 3, 1958, July 11, 1958.

7-31-58. Entered and filed nolle prosequi as to Dorothy Stracuzza. Cashin, J.

INDICTMENT.

No. C-145-232

The Grand Jury charges:

1. From on or about May 15, 1953, up to and including July 27, 1953, in the Southern District of New York, ANTHONY STRACUZZA, MARIO STRACUZZA, DOROTHY STRACUZZA, MAX SCHAFFER and NORMAN SCHAFFER, the defendants, unlawfully, wilfully and knowingly transported and caused to be transported in interstate commerce, to wit, from the Southern District of New York to Lebanon, Pennsylvania, certain goods, wares and merchandise, to wit, ladies' and children's wearing apparel of a value in excess of $5,000, knowing the same to have been stolen and converted.

(Title 18, United States Code, Sections 2314, 2.)

SECOND COUNT.

The Grand Jury further charges:

1. From on or about June 11, 1953, up to and including July 27, 1953, in the Southern District of New York, ANTHONY STRACUZZA, MARIO STRACUZZA, DOROTHY STRACUZZA and BENJAMIN T. MARCO, the defendants, unlawfully, wilfully and knowingly transported and caused to be transported in interstate commerce, to wit, from the Southern District of New York to Bluefield, West Virginia, certain goods, wares and merchandise, to wit, ladies' and children's wearing apparel of a value in excess of $5,000, knowing the same to have been stolen and converted.

(Title 18, United States Code, Sections 2314, 2.)

THIRD COUNT.

The Grand Jury further charges:

1. From on or about May 21, 1953, up to and including July 27, 1953, in the Southern District of New York,

ANTHONY STRACUZZA, MARIO STRACUZZA, DOROTHY STRACUZZA and HYMAN KARP, the defendants, unlawfully, wilfully and knowingly transported and caused to be transported in interstate commerce, to wit, from the Southern District of New York to Fall River, Massachusetts, certain goods, wares and merchandise, to wit, ladies' and children's wearing apparel of a value in excess of $5,000, knowing the same to have been stolen and converted.

(Title 18, United States Code, Sections 2314, 2.)

FOURTH COUNT.

The Grand Jury further charges:

1. From on or about September 1, 1952, up to and including the date of the filing of this indictment, in the Southern District of New York, ANTHONY STRAC ZA, MARIO STRACUZZA, DOROTHY STRACUZZA, MAX SCHAFFER, NORMAN SCHAFFER, BENJAMIN T. MARCO and HYMAN KARP, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with various other persons whose names are to the grand jury unknown, to commit an offense against the United States, to wit, to violate Section 2314 of Title 18, United States Code.

2. It was part of said conspiracy that the said defendants would transport and cause to be transported in interstate commerce goods, wares and merchandise, to wit, ladies' and children's wearing apparel of a value in excess of $5,000, knowing the said goods, wares and merchandise to have been stolen and converted.

(Title 18, United States Code, Section 371.)

OVERT ACTS.

1. In pursuance of the said conspiracy and to effect the objects thereof, in the Southern District of New York,

on or about the 28th day of July, 1953, the defendants ANTHONY STRACUZZA, DOROTHY STRACUZZA and MAX SCHAFFER were present at the premises 48 West 25th Street, New York City.

2. Further in pursuance of the said conspiracy and to effect the objects thereof, in the Southern District of New York, during the month of July, 1953, the defendants ANTHONY STRACUZZA and NORMAN SCHAFFER were present at the premises 48 West 25th Street, New York City.

3. Further in pursuance of the said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 21st day of July, 1953, the defendants ANTHONY STRACUZZA and BENJAMIN T. MARCO were present at the premises 48 West 25th Street, New York City.

4. Further in pursuance of the said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 21st day of May, 1953, the defendant ANTHONY STRACUZZA had a telephone conversation with the defendant HYMAN KARP.

(Title 18, United States Code, Section 371.)

J. EDWARD LUMBARD,
United States Attorney.

.....

Foreman.

INDICTMENT.

C-145-233.

The Grand Jury charges:

1. Beginning on or about September 1, 1952, and continuously thereafter up to and including the filing of this indictment in the Southern District of New York, ANTHONY STRACUZZA, MARIO STRACUZZA, DOROTHY STRACUZZA, MAX SCHAFFER, NORMAN SCHAFFER, HYMAN KARP and BENJAMIN T. MARCO, the defendants herein, unlawfully, wilfully and knowingly conspired, combined, confederated and agreed, together and with each other, and with other persons whose names are to the Grand Jurors unknown, to violate Title 18, Section 659, United States Code.

2. It was part of the said conspiracy that the defendants ANTHONY STRACUZZA, MARIO STRACUZZA, DOROTHY STRACUZZA, MAX SCHAFFER, NORMAN SCHAFFER, HYMAN KARP and BENJAMIN T. MARCO, would buy, receive and have in their possession certain goods and chattels, to wit, ladies coats, dresses, blouses, slips, sweaters, shoes and other ladies' and children's wearing apparel, the value of which exceeded $100, which goods and chattels were embezzled, stolen, unlawfully taken, carried away and concealed from motor trucks, platforms and depots and which goods and chattels were moving as, were part of, and constituted interstate shipments of freight and express, knowing the same to have been embezzled and stolen.

3. It was further a part of said conspiracy that the defendants would transport and cause to be transported in interstate commerce said goods and chattels, knowing the same to have been embezzled and stolen.

OVERT ACTS.

1. In pursuance of the said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 25th day of July, 1953, the defendants ANTHONY STRACUZZA, DOROTHY STRACUZZA and MAX SCHAFFER were present at the premises 48 West 25th Street, New York City.

2. Further in pursuance of the said conspiracy and to effect the objects thereof, in the Southern District of New York, during the month of July, 1953, the defendants ANTHONY STRACUZZA and NORMAN SCHAFFER were present at the premises 48 West 25th Street, New York City.

3. Further in pursuance of the said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 21st day of July, 1953, the defendants ANTHONY STRACUZZA and BENJAMIN T. MARCO were present at the premises 48 West 25th Street, New York City.

4. Further in pursuance of the said conspiracy and to effect the objects thereof, in the Southern District of New York, on or about the 21st day of May, 1953, the defendant ANTHONY STRACUZZA had a telephone conversation with the defendant HYMAN KARP.

(Title 18, Section 371, United States Code.)

J. EDWARD LUMBARD,
United States Attorney.

.....
Foreman.

(265) UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

C. 145-232.
C. 145-233.

Before: HON. THOMAS F. MURPHY, *D. J.*, and a Jury.

New York, April 21, 1958;
10:30 o'clock A. M.

Appearances:

PAUL W. WILLIAMS, ESQ., United States Attorney, for the Government; By John T. Moran, Jr., Esq., Assistant United States Attorney;

IRVING W. COLEMAN, ESQ., Attorney for Defendants Max Schaffer and Norman Schaffer;

HARRIS STEINBERG, ESQ., Attorney for Hyman Karp;

JEROME KATZ, ESQ., and PAUL RUTHEISER, ESQ., Attorneys for Defendant Benjamin T. Marco.

EXCERPTS FROM TESTIMONY.

(324) Mr. Steinberg: May I say this: That henceforth, unless indicated to the contrary, any objections will be on behalf of all, in order to save time, if your Honor please.

The Court: Well, that might not be what you all want, unless you specifically agree that the objections by one inures to the benefit of all, because sometimes it might hurt you.

* Figures in parentheses refer to page numbers of typewritten transcript.

Mr. Steinberg: Well, we have agreed among ourselves that will be an easier and quicker way of doing it.

The Court: Yes, but it might hurt one defendant.

Mr. Steinberg: We will try to avoid that. Where such a situation comes up, we'll——

The Court: Can I assume then that when one lawyer objects, he objects for all?

Mr. Steinberg: Yes, sir.

Mr. Coleman: Except——

Mr. Steinberg: Except where otherwise indicated.

(325) Mr. Coleman: Yes. I think there may be instances, as your Honor suggested, that objections may be valid on behalf of the Schaffers that may possibly not be valid on behalf of another. That is true, but we thought that perhaps this could expedite the course of the procedings, your Honor.

The Court: That is all right.

• • •

(1407) The Court: All right.

Now, I will hear the motions of the defendants. But I think it will save me some time, (1408) because I am very much concerned about the conspiracy counts, if I hear the Government first, as to what you think the proof is on both conspiracy counts.

• • •

(1414) The Court: Well, I assume that all defendants move to dismiss all of the various counts in both indictments, at least for their first motion.

Mr. Steinberg: Yes, sir.

The Court: Well, I will grant the motion with regard to both conspiracy counts. So that means that Indictment No. 145-233 is dismissed in its entirety, and count 4 in Indictment 145-232 is also dismissed as against the defendants on trial, in both indictments.

Mr. Moran: May I ask of the Court whether the dismissal is based on a failure to prove a single conspiracy or because of the variance?

The Court: Well, I don't think that you may come anywheres close to the standard that you (1415) have to prove, either as to whether or not there were three separate conspiracies or just a general conspiracy. If you had it worded as three separate conspiracies that is, Stracuzzas and Marco, Stracuzzas and Karp, Stracuzzas and Schaffers, you might have been closer.

* * *

(1416) The Court: But I will grant the motions with regard to both conspiracy counts, and before the argument is heard on the substantive counts, I must in fact tell you that I am very much concerned about the aggregate value, and I only can find one case—the defendants evidently have found (1417) only one case—and your memorandum didn't cite that one case. I haven't read your value cases. Do they relate to the aggregate value? You have four cases on value.

Mr. Moran: I don't believe I gave four cases on value. I gave—unless——

The Court: Four. Here they are, Mr. Moran.

Mr. Moran: Oh, I am sorry.

The Court: Are you familiar with the names of them, to tell whether or not they relate to the problem of lumping values together?

Mr. Moran: Frankly, I am not, your Honor. I am basing my argument to a large extent on the definition of Section 2311.

The Court: Yes.

Mr. Moran: And the Andrews case, I believe.

The Court: That is the one you didn't cite.

Mr. Moran: Oh, I am sorry. I realize that before the Court in that case was the question of grouping a number of shipments.

The Court: My only question now is, have (1418) you been able to find any case dealing specifically with lumping aggregate shipments, other than the Andrews case?

Mr. Moran: No, I have not, your Honor.

The Court: So we are stuck. That is the only one I could find. That is the only one they have cited.

Well, all I can say is that I am just disturbed about it. I will hear the other arguments first.

Mr. Moran: All right.

The Court: So that all that is left, gentlemen, are the three substantive counts. I will hear each counsel on each.

Mr. Steinberg: If your Honor please, you have deprived yourself of hearing a great argument on motion.

Before we get to those points, your Honor, I would like to address myself to the huge mass of evidence which has been admitted here subject to connection on the conspiracies which your Honor has dismissed, and your Honor is familiar with the Cannella case?

The Court: Yes, but the mass can be very (1419) easily segregated.

Mr. Steinberg: Well, it can be easily segregated as a matter of mechanics. Sure, you can tell the jury, "Don't consider this, that and the other things against this man." You can tell them, "Don't consider this." As your Honor knows, there are over 200 exhibits, involving over a thousand sheets of paper here.

The Court: Those are just numbers. 50 of them are checks; 60 more are checks.

Mr. Steinberg: Just bear with me a moment, if your Honor will.

Aside from that, there is evidence here against the defendant Marco that he told someone that he knew the stuff was stolen. That evidence came from Miss D'Andrea. That is very damaging evidence. And when we are all tried together and the jury sees all these men, it is hurtful to anybody, anybody else.

There is evidence that Mr. Schaffer, when he was apprehended, gave a false story to the FBI. That is hurtful to my man, too. There is evidence of a motion picture, where he was walking up and down, selecting something, and a piece of paper was (1420) in his hand, which they will argue was an invoice. That is hurtful, too.

Now, if your Honor please, I think all the evidence which has been admitted of that character—and I am not speaking of the documents alone, but of that character—against these men, have reduced the chances of a fair trial, as far as my defendant Karp is concerned.

Now, if there were no conspiracy indictment in this case at all from the beginning, and the District Attorney has to take that chance—it was his calculated risk; he w ats to proceed on a conspiracy indictment, knowing the risks of showing in indiscriminate evidence, hoping it will be connected later, but not having succeeded in doing that, he took the calculated risk that a great deal would go in which might prejudice one man and another man, then we will be faced with a problem, can that prejudice be eliminated satisfactorily to comply with the proper tests of the law?

Now, since he has failed in the conspiracy test, he is now in the position of having put that evidence in, and I seriously feel, your Honor, that there is very grave doubt that no matter what (1421) instructions your Honor conscientiously gives, it will be very difficult to erase that.

The Court: I don't think so.

Mr. Steinberg: I offer that to your Honor.

The Court: Yes.

Mr. Steinberg: Now, it is not necessary, I take it, for me to move that the evidence admitted subject to connection, that your Honor will of course tell the jury that it is not applicable to the various defendants.

The Court: I will so tell them.

• • •

(1424) Mr. Steinberg: If there is, I won't labor that any more.

But insofar as the element of $5,000, which your Honor has already given attention to, I strongly urge that there is no proof here that there was a single impulse, that there was the kind of activity which was referred to in the Andrews case, so that they can be aggregated into one count to make up five thousand, as has been done here, and the proof is totally defective in that regard.

The Court: Well, counsel are agreed that the aggregate value with regard to each defendant exceeds five, and you are also agreed that no shipment individually equalled five.

Mr. Steinberg: Yes.

The Court: That is correct.

Mr. Steinberg: Yes. But, if your Honor please, the fact that he received $5000 worth of merchandise over a period, and that no shipment was of that value, would mean under the Andrews case that you have to find a certain mental operation there; isn't that so, your Honor?

The Court: Well——

Mr. Steinberg: A certain scheme, or, in (1425) other words, that it was shipped pursuant—in other words, suppose he said this: "I am ordering $20,000. Ship it to me in four installments."

The Court: In the Andrews case it was a conspiracy count to start with; it wasn't a substantive count.

Mr. Steinberg: Yes, but wouldn't you have to—I ask this not captiously—wouldn't you have to have something like that here to aggregate it, if your Honor please?

The Court: Well, that is part of the problem, gentlemen, as to whether you can or cannot aggregate these shipments without proof of some sort of matter.

Mr. Steinberg: I leave that with your Honor. You have given it the attention, and I thank you very much for the attention you have given it.

The Court: Gentlemen, I can tell you that it bristles with questions on which I am not completely satisfied.

What I have in mind, although I don't want to cut you off, is to give the case to the jury on the three substantive counts, and tell them that they have to find that the value —and I suppose they will almost have to find it pursuant to stipulation— (1426) that the aggregate value is over five, and you just have to take an exception to that part of the charge, see what the jury does, and then we consider it again, because I am not too clear what the definition in 2311 really means, where it says you can group these values together if they are included in one indictment. I am inclined to believe that the one indictment means the one charge, so that it is three separate counts relating to the three groups of defendants. I don't think you can take one indictment and charge 70 men and prove a thousand dollars for each one, and then say since the indictment totals $70,000 it comes within the statute. I don't know, and I would like you to work on some sort of a charge with regard to that one item, and I will charge it the way you want me to, Mr. Moran.

Mr. Moran: All right, sir.

The Court: And see what happens.

Mr. Steinberg: We will be glad to submit requests to charge on that point, so your Honor will have them before you.

The Court: Yes.

Mr. Steinberg: As an alternative.

(1427) The Court: But in order to conform with the status of the case now, in order to give it to the jury, I have to assume that the jury can consolidate the amounts over this period of time. In your case, Mr. Steinberg; it is from May——

Mr. Steinberg: May 21st.

The Court:—May 21st to July 27th.

Mr. Steinberg: Yes, sir.

The Court: And I think that is probably the date with all.

Mr. Steinberg: No, I think it is a shorter date with Karp.

Mr. Katz: Marco is June 11th.

The Court: That is the way I will submit it to the jury on that issue, so in effect your case should be devoted, I assume, to your guilty knowledge, and the question whether the goods were stolen.

Mr. Steinberg: And whether we——

The Court: The part about the platforms and trucks, and so forth, is out of the case.

Mr. Steinberg: That is out now, as I understand it.

The Court: I suppose I could charge the (1428) jury, as the statute says I can, that the interstate commerce is proved by the waybills or the bills of lading.

Mr. Steinberg: I think there is a presumption from those, yes.

The Court: And it's all according to the stipulation, shipped from New York to these various out-of-state places.

Mr. Moran: That presumption is only in 659, your Honor.

The Court: Is it?

Mr. Coleman: Yes, your Honor.

May I say something that might help your Honor's thinking on the point you have raised?

One of the defendants, your Honor—and I don't take credit for it, but I did do the research and found that Andrews case—one of the defendants against whom the proof was only of a thousand dollars——

The Court: We found it without your help, too. Don't take all the credit.

Mr. Coleman: Thank you, your Honor.

One of the defendants who had received a thousand dollars, your Honor, was discharged, which (1429) is an indication that the Court——

The Court: What defendant is this?

Mr. Steinberg: In the——

Mr. Coleman: In the Andrews case.

The Court: Oh, yes.

Mr. Coleman: —which is an indication of the Court's thinking. The other amounts, with respect to the other defendants, couldn't be added to that amount. But I will be glad to try to furnish you some more authorities on that point.

The Court: I don't think there is. My clerk checked Shephard's, and there is no case mentioned other than the Andrews case, up to date. I think that is all there is.

Mr. Moran: I think it's an open question.

The Court: I think so, too. I think it is fairer to the Government to give the jury a chance to say yes or no, and if they say no, that is the end of it. If they say yes, you have the right of appeal, and everything else.

Mr. Steinberg: Your Honor, as I understand the Federal Rules, if we make a motion at the end of the whole

case for a judgment of acquittal, you can take that under advisement even after the (1430) jury's verdict?

The Court: What I am going to do now puts you in a most unique position. I am going to assume you are asking for a motion to dismiss counts 1, 2 and 3 of Indictment 145-233, or for a directed verdict as to each of those counts, and I am going to reserve decision, and you know from reading the cases that you put your case in at your peril, because it might develop to your disadvantage.

Mr. Steinberg: I know that, and that is a quandary. That is why I said, at the end of the whole case, if we make a motion, your Honor can take it under advisement. But if you say you are going to reserve decision——

The Court: I do now reserve. I assume you all join in the motion to dismiss the respective counts in which your clients are mentioned.

Mr. Steinberg: We do, your Honor.

* * *

(1435) TRIAL RESUMED.

(Jury in box.)

The Court: Ladies and gentlemen of the jury, again we have not been idle. I can tell you that we will be finished in a few minutes.

Yesterday I dismissed ~~one~~ indictment in its entirety, and that was the indictment that charged these defendants and others with conspiring to violate the particular law involved; and I also dismissed the conspiracy count in the indictment that remains.

The net result of that is that you people will deliberate on the case and concern yourselves with what lawyers call the substantive offenses that are charged against each of these defendants, and you will dismiss from your mind any question of conspiracy at all.

(1436) That means, too, that the various exhibits and testimony that I admitted against one defendant subject to connection against the others is now admitted only against

that particular defendant that the exhibit referred to, or the testimony referred to.

* * *

(1441) And the last stipulation has been entered into in behalf of the defendants Max Schaffer and Norman Schaffer by their counsel, Irving W. Coleman, and by the United States of America, and it reads as follows:

(1442) It is hereby stipulated and agreed by and among the defendants Max Schaffer and Norman Schaffer, and their counsel, Irving W. Coleman, and the United States of America, by Paul W. Williams, United States Attorney for the Southern District of New York, as follows:

"1. That a representative of the consignors (manufacturers) named in the schedules, Government's Exhibits 228, 230 and the second page of Exhibit 229, if called as a witness in behalf of the Government, would testify that the consignor's copy of the invoice, which invoice number is set forth in said exhibits, was made and kept in the regular course of business, and that said representative would also testify that the shipping documents pertaining to the merchandise described in such invoice were retained by said consignors in the regular course of business, and that such representative would identify the articles of clothing as garments manufactured by said consignors or by contractors pursuant to an agreement with said consignors.

"2. That the United States Marshal for the Southern District of New York, or one of his deputies, (1443) if called as a witness for the Government, would testify that he has maintained in his possession the articles of clothing which were recovered from the premises of Schaffer's Women's Apparel Shop, Lebanon, Pennsylvania, and that said merchandise was delivered to him by agents of the Federal Bureau of

Investigation, or by the United States Marshal for Pennsylvania.

"3. That the aggregate value of the merchandise consisting of ladies' wearing apparel, which was transported from the Southern District of New York to Lebanon, Pennsylvania, to the defendants Max Schaffer and Norman Schaffer, during the period from on or about May 15, 1953, up to and including July 27, 1953, was in excess of $5000. Each shipment was a value of less than $5000.

"4. No consignor, manufacturer or manufacturer's representative would be able to recognize a particular garment or garments as being included on this specific invoice."

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(1446) Mr. Coleman: If the Court please, on behalf of the defendants Max and Norman Schaffer, in which motion Harris B. Steinberg, counsel for Hyman Karp, and Jerome Katz, counsel for Benjamin T. Marco, join, we move that pursuant to Rule 29(b) of the Federal Rules of Procedure, Federal Criminal Rules of Procedure, the evidence having closed on both sides, that a motion for judgment of acquittal on the remaining substantive count in the indictment, with respect to each defendant, be granted upon the basis that the Government has failed to establish that merchandise was transported in interstate commerce, in a value equal to or in excess of the jurisdictional amount set forth in Section 2314 of 18 U. S. C. A., and that with knowledge that the same was stolen.

The Court: As I indicated yesterday, I will reserve decision on the motion as to each defendant.

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MR. MORAN—FOR GOVERNMENT—SUMMATION.

(1549) Mr. Moran: May it please the Court, Mr. Steinberg, Mr. Katz, Mr. Coleman, Mr. Foreman and Ladies and Gentlemen of the Jury:

We have now reached the final stage of the trial that pertains to the evidence and summations, and you have sat here, listened for the last two weeks to the evidence that was presented by the Government, and listened to the witnesses as they testified, and saw portions or some of the exhibits that were offered in evidence by the Government.

It is now my privilege to try to tie in in some way some of the loose threads, some of the missing points or portions of the jigsaw puzzle that must exist, I am sure, in your minds, because of the large number of exhibits here, and to indicate to you in some way how they tie in to each of the defendants that are now on trial before you.

(1550) Before I begin my summary, however, I wish to address myself, in the way of making a few comments as to some of the remarks that were made in the course of the summations by the defense counsel this morning.

There were allusions from time to time, or suggestions, if you will, as to why the Government had not called certain persons as witnesses, so that they could be subjected to cross-examination by the defense counsel. Two of the names that were prominently mentioned were Mario Stracuzza and Dorothy Stracuzza.

As you recall, during the course of the trial Dorothy Stracuzza, as was indicated, the Government's case against her pertaining to the two indictments that these defendants were brought to trial on, she was severed; she is still a defendant in this court. The charges are still open against her. They have not been dismissed in any way.

As to the other defendant, Mario Stracuzza, it is the Government's representation to you that he could have offered nothing in the way of additional evidence that was not presented to you through his brother. Because if you

will recall from the (1551) testimony of Agent Miller, both Stracuzzas were interviewed on each and every occasion by him, their story, their testimony, if you will, given to the FBI, was a joint story, and therefore, the testimony of Mario Stracuzza, if he were called to testify, would be in a sense a repetition of all the details that you heard through the witness Anthony Stracuzza.

Furthermore, the Government is not required to call any witness if we believe that there is nothing further that that witness can contribute in the search for the truth.

As Mr. Steinberg told you, and as I will say to you now, he had an opportunity to bring Mario Stracuzza to the witness stand. He also had an opportunity to bring Dorothy Stracuzza to the witness stand. He did not do so for reasons best known to himself.

Now, in making these comments as to the conduct of the prosecution, there was some criticism as to the extent that the Government failed in its obligation to its citizens to bring out all the facts. I say to you as an assistant United States attorney, my job is not to convict people, but is to bring them (1552) here in court, give them a fair chance to meet the charges that the Government has presented against them.

The motto on the building of the Department of Justice in Washington I think fairly indicates the attitude of the Government, as far as its citizens are concerned. It reads:

> "The Government wins when justice is done its citizens in the court."

Now, of course, if you believe that the Government has in some way or other prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march right into that jury-room and acquit every one of these defendants.

Mr. Steinberg: May I approach the Bench for a moment, please?

The Court: No, you have to say it in public, counsel.

Mr. Steinberg: I respectfully move for the withdrawal of a juror on that remark, as an improper remark.

The Court: I will deny it. You may have (1553) an exception.

Mr. Steinberg: Exception.

Mr. Moran: Your sole function in this case is to decide the guilt or innocence of the four defendants on trial. You are not here to speculate as to what the Government should have done or could have done, or it actually did do to any of these persons whose names have been mentioned in the course of this trial.

Now, with that in mind, I will now begin a summary of what I believe the Government's evidence consists of in this case.

The Government called as its first witness Anthony Stracuzza, and he told you that in April of 1952 he began his association with Berk and Eisenberg at their place of business on West 33rd Street; that he continued his association with them for a period of two months—for the months of April and May of 1952; that he received for his services of removing tags and labels from garments that had been brought to the office by various truckdrivers in the garment area a sum of approximately $35 a week; that there came a time in June of 1952, when Berk and Eisenberg decided to open a (1554) new place at 110 West 40th Street, and Anthony Stracuzza continued to operate the office at 33rd Street, receiving instead of $35 a week, a percentage of the manufacturer's invoice of the price that the merchandise was sold by the truckdrivers to Berk and Eisenberg, namely, I believe he testified that he received 55 per cent of that invoice price, and had to pay out approximately 45 per cent, and that if the merchandise was sold above 55 per cent, Berk and Eisenberg kept that part.

Now, at that time, in April and May, before Eisenberg and Berk moved to their office on 40th Street, Stracuzza

testified that each of these defendants, now on trial before you, Max Schaffer, Norman Schaffer, Benjamin T. Marco and Hyman Karp, came to the office; he saw them in the office examine merchandise, and so forth. Also, at that time he saw Freddy Kusnick, and Beatrice Goldman, who I am sure their names meant little or nothing to you at that time, but as I will show you during the course of the evidence that the Government placed in against these defendants, their names had some significance. (1555) Anthony Stracuzza continued to operate the office on 33rd Street until sometime in August of 1952, when Berk decided at that time that they should move to a new location. They therefore took up their place of operation at 1133 Broadway, which is at 26th and Broadway, and they continued from that place of business to perform the same operation, namely, truckdrivers would come in with various parcels and items of merchandise; they would be paid a certain percentage of the manufacturer's invoice price, and Anthony Stracuzza would receive approximately 55 per cent of the invoice price and would pay approximately 45 per cent of the invoice price.

At this time he was associated with his brother, Mario Stracuzza, who joined him in the operation the last few weeks while they were on 33rd Street.

Berk continued in his association with Eisenberg at the 40th Street office, but continued to associate himself also with Mario and Anthony Stracuzza at the place of business on 26th Street, where they operated under the name of A. Finkel. They operated under that name, A. Finkel, from (1556) September of 1952 until sometime in March of 1953.

During that period of time Stracuzza testified that the defendants Max and Norman Schaffer would come to the office of A. Finkel, at 26th and Broadway; they would be shown copies of the original manufacturer's invoices, with the price, with the description of the merchandise, and they would examine the merchandise there in the office.

Also during this period of time Hyman Karp came on four occasions, as far as the testimony of Anthony Stracuzza is concerned. You recall the testimony of Agent Davidson, as to his conversation with Karp, in which Karp admits to him that he came to the office at 26th Street at least six times, and he was there introduced to Tony Stracuzza sometime in September or October of 1952.

You also recall the testimony of Anthony Stracuzza, to the effect that Karp also was shown merchandise and original copies of manufacturers' invoices, so he could get some idea of the price that he had to pay.

Now, there was no testimony from Stracuzza or any other source concerning Benjamin T. Marco on (1557) the 26th Street office. As far as the Government knows, he at no time ever came to the office or purchased any merchandise from Stracuzza while he was operating under the name of A. Finkel. Karp's name first comes into this picture when Stracuzza had opened the place of business on 25th Street, under the name of A. Schafler.

Stracuzza testified that he had, as part of this operation, opened a bank account under the name of Charles Santangelo, at the Federation Bank & Trust Company, at 34th and Eighth Avenue, I believe he testified; that he used this bank account in which to make certain deposits of checks that were sent in by the Schaffers and by Hyman Karp. Stracuzza testified that the Schaffers sent their checks directly to the office, and that they were deposited by Stracuzza in the bank account, to the most extent.

However, there were a few occasions when he took several of those checks, had them cashed in a local supermarket by his sister-in-law, Marie Stracuzza, who is the wife of Mario Stracuzza, or had his wife, Dorothy Stracuzza, cash them or deposit them in her bank account, out in Long Island. (1558) He had two bank accounts, if you will recall, Lillian Schaefler and Dorothy Stracuzza.

Now, the operation essentially was the same on 26th Street that it had been on 33rd Street. The Stracuzzas

received a certain percentage, 55 per cent of the invoice price, and the truck-drivers received upward of 45 per cent of the invoice price. Berk received anything over 55 per cent.

During the course of time that the Stracuzzas were dealing under the name of A. Finkel on 26th Street, you recall the testimony of Anthony Stracuzza to the effect that there came a time sometime in March of 1953 that he made a shipment of zoot suits to Hyman Karp at the Fall River Bargain Center, in Fall River, Massachusetts. He heard nothing about that particular shipment until after he had closed the place of business on 26th Street, and had opened the new place of business under the name of A. Schafler, on 25th Street. You will recall his testimony to the effect that he recalled receiving a telephone call from Hyman Karp in the latter part of May 1953, in which he told you he had a conversation with Karp, to the effect that Karp told him, or asked (1559) him, rather, "Do you have protection?", and Stracuzza made the statement to him at that time, that he did.

Now, the office on 25th Street, under the name of A. Schafler, was opened by Anthony Stracuzza and his brother, Mario Stracuzza, sometime in the early part of May 1953, and it continued under operation until sometime in July, the latter part of July, I think July 28, 1953, when the arrest was made by agents of the Federal Bureau of Investigation. During the time that they were in operation under the name of A. Schafler, invoices were prepared under that name, and sales of merchandise were made by the Stracuzzas to each of the defendants now on trial before you—the Schaffers, Benjamin T. Marco and Hyman Karp; and that the merchandise was purchased by Mario from various truckdrivers in the garment area. He would meet these truckdrivers by appointment at certain designated locations; he would pay for the merchandise a percentage of the invoice prices, which was approximately one-third of the invoice price; would bring the merchandise back to Tony in the office;

Tony would then examine it, and (1560) decide which of the customers he was going to send it to, then send it off to each of the customers.

He would enclose with that box of merchandise or with those boxes of merchandise his own invoice, under the name of A. Schafler, and would include invoices or portions of the invoices, of the manufacturers' invoices, that had been received with the cartons when they were purchased from the drivers.

He testified that he began doing business with Max Schaffer and Norman Schaffer in the early part of May 1953, when he initiated the contact with Max Schaffer by calling him in Lebanon, Pennsylvania. Max Schaffer at that time informed Anthony Stracuzza that he did not wish to do business with him, but some time later, approximately, I think, a week, he met Anthony Stracuzza in the office of Sol Eisenberg, still at their same place of business, at 110 West 40th Street. There they had a conversation in the presence of Norman Schaffer, in which Tony told him that he was now in operation for himself; that he had had a fallingout, as it were, with Berk, and that he could give him merchandise at a suitable price, that the Schaffers (1561) had received from Berk while they were operating under the name of A. Finkel.

He initiated the business with Karp by a similar telephone conversation sometime in the middle of May 1953. Karp, of course, never came to the office of A. Schafler, but he did all his dealings over the phone. Stracuzza has testified that in each of the shipments he sent original copies of the manufacturers' invoices along with his invoice, in which he copied the style number, the description and the price.

The same testimony was given as far as Marco was concerned, with the exception that the business with Marco was initiated sometime in the early part of June 1953. Stracuzza testified that he had first called Marco on the telephone and reminded him of the fact that he had met

him while Marco was doing business with Eisenberg and Berk, on 33rd Street, and he mentioned the name of Kusnick, as a person who could vouch for him.

Marco began to do business at that time with the Stracuzzas under the name of A. Schafler, and continued up until the date of the arrest. The testimony from Stracuzza is to the effect (1562) that in each of the shipments he sent original copies of the manufacturer's invoice, along with his invoice, in which he copied the style number, the description and whatnot.

The only variance in any of the practice that was made with any of these defendants was the fact—and if you recall the redirect testimony of Anthony Stracuzza, he admitted that his procedure varied as to the defendants Max and Norman Schaffer, to the extent that he would make an alteration in the invoice prices from the manufacturer's invoice. In other words, he would place the discount, give effect to the discount on his invoice to the Schaffers, and not copy the exact prices, as he had done with Marco and Karp, and that during the period of time when he was operating on 25th Street under the name of A. Schafler, the Schaffers, Norman and Max Schaffer, came to the office approximately every week or ten days, were shown the original manufacturers' invoices, were shown the merchandise which they subsequently purchased, and that during this period of time, which was from the early part of May until the end of July 1953, that on most occasions both the Schaffers came to the place of (1563) business.

However, there were occasions when Max Schaffer came alone, and when Norman Schaffer came alone, and that there were three occasions, as far as the defendant Marco is concerned, as to when he came to the office. The first occurred in the latter part of June, when he came by himself. He examined the merchandise and was shown copies of the original invoices. The next occasion was the first week in July, where the same thing happened; and the third visit, the third and last visit, occurred in the

third week in July of 1953, when Marco came with his wife and was shown original copies of the invoices, and examined the merchandise.

Now that in substance is the testimony of Anthony Stracuzza.

While I will not attempt to show you, despite all the attacks that have been made on Stracuzza, as far as his veracity and credibility are concerned, despite what you believe or what decision you come to as to some of the testimony, I will tell you that the Government, by the other witnesses we have produced and by the documents we (1564) have shown you, or will show you when you retire to the juryroom to deliberate this case, we have proved each and every material element that concerns the guilt or innocence of these defendants.

Now, I will show you how we have corroborated by other means, by means of the testimony of other witnesses and the documents that we have produced, the essential testimony of Anthony Stracuzza.

First of all, let's start with the defendants Max and Norman Schaffer. You recall the testimony of Anthony Stracuzza, to the effect that this Government's Exhibit 52, the ledger book, was a record that he kept of all the shipments that he made to each one of these defendants. He would note the dates, the invoice price and the invoice number. He would strike out by a line directly across the page when that particular invoice was paid. If you will look at this book, you will find that there only remains two invoices that were unpaid at the time the Stracuzzas were arrested. He explained this as the reason why he did not prepare a duplicate copy of the original invoices in the same fashion that he did with the defendants Karp (1565) and with Marco.

Now I direct your attention to the same exhibit, Government's Exhibit 52, and you will see that in the invoices, listing the shipments to the Fall River Bargain Center, that quite a few of these invoices remained unpaid; that they remained—that they were paid to a large extent up until

June 17, 1953, and as far as Marco is concerned, they remained paid to a large extent up until July 16th.

You will recall the testimony of Stracuzza to the effect that he had difficulty with Marco and Karp; that they didn't pay him promptly as did the Schaffers, because when he sent a shipment out to the Schaffers, the Schaffers immediately came back with a check, and he had no necessity to prepare a duplicate copy of an invoice, such as is reflected in Government's Exhibit 53, the duplicate copies of the invoices to the Fall River Bargain Center.

He also told you that Marco would from time to time return merchandise to him, and include in that merchandise items of clothing that had never even been sent by Stracuzza. If you will recall the testimony now of Agent Burke concerning (1566) the five cartons of merchandise that he found in the office of Benjamin T. Marco on July 29, 1953, you will recall that subsequently, after the initial conversation with Marco, when Marco represented to him that he was returning each and every one of these five cartons, intact, back to A. Schafler, that Agent Burke went to the office of the freight terminal in Bluefield, West Virginia, examined that merchandise, after he had initially made an inventory for himself of just what the contents were, and he found therein items of merchandise that he had not seen originally, items that apparently had never been sent by Stracuzza to Marco.

Now coming back for a moment to the Shaffers, you will recall the testimony of Agent Jolley, that on the 27th day of July, the day before the arrest of the Stracuzzas, he followed Mario Stracuzza to the freight terminal and saw him deliver four cartons of merchandise that were addressed "Schaffers, Lebanon, Pennsylvania," that he placed on each of those cartons a symbol, "M27," the "M" standing for Agent Miller, and "27" for the date, July 27, 1953.

(1567) The following day you heard testimony that those four cartons, plus another, were delivered to the freight terminal office, or the station of the New Pennsylvania Motor

Express, in Lebanon, Pennsylvania. You heard the testimony of the clerk there at the station, who testified that on that morning, after a conversation with Mr. Phillips, the traffic manager, he, Mr. Snyder, set aside those five cartons of merchandise that were addressed to the Schaffers in Lebanon, Pennsylvania. Thereafter, he removed from one of those cartons a number of invoices, which he then gave to Mr. Phillips, the traffic manager. Mr. Phillips then testified that he took these same invoices and gave them to Agent Hutson, of the FBI, who was waiting in the terminal. Agent Hutson then photographed these invoices and returned them to Mr. Phillips. Mr. Phillips in turn gave them back to Mr. Snyder, and Mr. Snyder enclosed them in the original carton.

Agent Hutson then testified that he watched those four cartons, which had been addressed to Schaffers, Lebanon, Pennsylvania, being delivered to Schaffers' store at approximately (1568) 12 o'clock noon on July 28, 1953.

Now, it has been said that the defendant Norman Schaffer was completely honest and was fully cooperative with the FBI at all times; he aided the agents in making the inventory of the merchandise that he had received from A. Schafler; that he pointed out which merchandise and which coats and suits and dresses had come from A. Schafler. The argument has been made that the Government has not in any way shown that he had any knowledge that these cartons ever arrived at the Schaffers' place of business on the morning of July 28, 1953.

Mr. Coleman: Your Honor, I don't wish to object, but we never contended that the cartons never arrived.

The Court: Well, it is the jury's recollection of the facts, in any event.

Mr. Moran: (Continuing) At this point, Mr. Phillips, the traffic manager, identified the shipping documents pertaining to each of the five cartons. On the first page of those documents, which has been received as Government's Exhibit 193, there is a signature "N. Schaffer." You recall

then the testimony of Agent Hutson, that he went (1569) into the Schaffer place of business at six o'clock on July 28, 1953, after having seen these five cartons delivered to Schaffers' place of business at 12 o'clock noon.

Now this is where time becomes important in a case like this. We will go back to the same day, July 28, 1953, before we get back to this particular document concerning the delivery of five cartons of merchandise to Schaffers on that day. You recall that on the morning of July 28, 1953, Mr. Winisch, the FBI photographer, was across the street in the place where the FBI had a stakeout, let's say, of the office of A. Schafler at 48 West 25th Street. He testified that he saw Max Schaffer enter the office at approximately 11.15 on that morning and stay for approximately one hour, leaving at approximately 12.15; that during that period of time he observed Max Schaffer examine merchandise, examine what appeared to him to have been papers or documents that were taken from some of the boxes that appear in the motion picture, which has been identified and received as Government's Exhibit 186, where a group of white boxes were stacked alongside the window. Thereafter (1570) you heard testimony that Max Schaffer again appeared in the office of Stracuzza at approximately four o'clock that same afternoon, and there he encountered Agent Jolley, and Agent Howard Laduke, who were then proceeding to inventory the items of merchandise, and other things that were found by the FBI when they made the arrest at approximately 12.30.

Max Schaffer at that time was interviewed and gave a statement. You recall the statement in which he denied ever having done any business with A. Schafler, or knowing Tony.

Former Agent Jolley then testified that at approximately 4.30 in the afternoon Max Schaffer left the office.

Now, it doesn't take much imagination to speculate as to what happened between 4.30 in the afternoon, when Max Schaffer left the office, until 6 o'clock at night, back in

Lebanon, when the agents of the FBI, Hutson and the others, walked into the store. Max Schaffer of course was not aware of the fact that the FBI had observed his dealings with Tony Stracuzza across the street. He was not aware of the fact that they had taken motion pictures of him, examining merchandise, examining (1571) invoices that were contained in any of the cartons of merchandise, and it doesn't take much imagination for you to imagine what Max Schaffer did at that time. So that when the agents walked into the Schaffer store at 6 o'clock, Norman Schaffer wasn't taken by surprise; he knew what had happened in New York City approximately an hour or an hour and a half earlier.

It has been represented to you that he was completely cooperative with the Government; that he was completely forthright; that he told everything about this; he laid open his books and records—he showed everyone the merchandise.

Now, we will get to the receiving ledger, which has been identified and received as Government's Exhibit 199-B. There is an entry for the 28th day of July, from A. Schafler, with the numbers "302" and "304" therein. There is also an entry in Stracuzza's ledger for the Schaffers, the only ones that were marked unpaid, the same invoice numbers, "302" and "304."

Now, to get back to the early part of the day, when Agent Hutson opened those—rather, took photographs of the invoices that had been given (1572) to him by Mr. Phillips at the traffic terminal, you will see in the photographs that were introduced through Agent Hutson the A. Schafler invoices No. 302 and No. 304, with the addition of five manufacturers' invoices that were found in the cartons on that day.

Agent Hutson testified that in addition to making the photographs, which are pictured here in the Government exhibits, he removed a tag, several tags, from the merchandise that was found in one of the cartons. One of those

cartons relate to coats with the marking "Grosfeld," and the other one, pertaining to an item, Style No. 906, he testified, that he had seen on coats and some skirts in that carton. When he talked to Norman Schaffer that same night, at 6 o'clock, he testified that Norman Schaffer told him that the merchandise in those boxes consisted of blouses. There was no testimony or no statement from Norman Schaffer about the coats.

It has been argued to you that Norman Schaffer was completely cooperative at all times. Agent Hutson and other agents of the FBI then came back five days later and proceeded to make an inventory of the merchandise that was included in (1573) the Schaffers' store, that had been received from A. Schafler. At no time did they ever find the coats that were in those cartons on the morning of July 28, 1953.

In a subsequent interview with Norman Schaffer he was asked about the invoices described as No. 302 and No. 304, and also the invoices that were contained in those cartons on the morning of July 28, 1953. He denied knowing anything about them and denied that they had ever been received or contained within those cartons.

Now, I ask you, is that the testimony of a person who is completely cooperating with the Government, who is completely honest and aboveboard?

In the course of the cross-examination of Agent Hutson, he stated to you that after the original visit to the premises of Schaffers' store on the evening of July 28, 1953, the agents only watched the place periodically until they made a complete inventory beginning around August 5, 1953, and he testified on cross-examination that they did not remove—they did not see the Schaffers remove items of merchandise during that period of time, (1574) with the inference for you to take of course that if the Schaffers were dishonest, they were trying to hide something, that they would immediately have gotten rid of any of that merchandise that they had received from Schafler.

Now, the most foolish thing that any of these defendants could have done was to try to dispose of any of the merchandise that they had received. They were not aware at the time how much the FBI had on Tony and Mario Stracuzza. They thought by making a complete—or what seemed to be a complete and forthright statement and a complete examination of all their books and records that they would convince the FBI and the Government that they had no knowledge that any of this merchandise was stolen, because they did not realize that the Government had photographed the invoices that were contained in the five cartons—in the four cartons, rather, that had come to the Schaffers on the morning of July 28, 1953. So I say to you that Norman Schaffer, in his testimony, in his statements to the FBI, was not telling the truth. He hid the one thing, he held back on the one thing that would have shown that he had actual knowledge (1575) of what this operation was all about.

The next witness called by the Government pertaining to Max and Norman Schaffer was Special Agent Mabes, of the FBI, who testified that at my direction and request he had analyzed and made a summary of the purchases or the merchandise that was reflected in the Schaffers' invoice books, No. 199-A and 199-B.

Now, sometimes figures can be very revealing, and I think that that statement is very applicable to this situation.

Government's Exhibit 200, which Agent Mabes prepared, revealed that during the course of time, from September 1952 up until the arrest of the Stracuzzas on July 28, the Schaffers, Max and Norman Schaffer, had purchased approximately sixty-odd thousand dollars worth of merchandise, and that their overall purchases from the Stracuzzas, operating under the name of A. Finkel and under A. Schafler, and from Eisenberg and Berk, amounted to 26.92 per cent, and in the last two months, June and July of 1953, that percentage was 48.91, and in July it was 54.37. (1576) Now Mr. Coleman in the course of his summation

says, directing his attention to the ladies in particular, as I recall it, that we all get bargians from time to time; that the stores here, Macy's, and the other places, they have sales in which you can make a very good saving from time to time, as they have close-outs at various times during the year. But I ask you, considering the fact that Stracuzza testified that the Schaffers were purchasing this merchandise at 35 per cent wholesale, that this process did not occur at odd times during the year; it occurred each and every week, from September 1952 until July 1953, with the exception of the time that the Stracuzzas were out of operation in April, and the early part of May 1953.

Now, I ask you, if this practice of getting substantial discounts is not unusual, and it is a regular practice in the garment area, why did the purchases continue to mount percentagewise from these four sources? Why couldn't this merchandise have been purchased from someone else? I will tell you why, because they couldn't get this merchandise at the ridiculous discounts that the Stracuzzas were giving it to them.

(1577) Now going back again to July 28, 1953, the day of the arrest, Agent Miller testified that during the course of the inventory of the office of the Stracuzzas on the afternoon of July 28, 1953, the FBI found a number of cartons, one of which was a sealed carton addressed to the Fall River Bargain Center, in Fall River, Massachusetts, and there was enclosed therein some invoices, manufacturers' invoices, with the invoice of Schafler, and he said to you in effect, that even if Hyman Karp received invoices of a similar nature at some prior time, that they really have no significance, and I believe that Mr. Katz made a similar argument to you.

Well, I ask you this question: If these manufacturers' invoices had so little significance, why didn't Norman Schaffer produce them for the examination of the FBI? Why did he deny that he had ever known about them or

that Schaffers had ever received them? I ask the same question concerning Benjamin T. Marco.

You remember when Agent Burke went into the office or went into the store of Benjamin T. Marco on the 29th day of July 1953, Marco stated (1578) to him at that time, after Burke had examined the five cartons of merchandise that he had received from Schafler and Berk, he found two of the invoices, the manufacturers' invoices, he admitted that on one prior occasion he had received a similar invoice, which he did not produce. He did not tell Agent Burke, which Agent Burke subsequently found in the trash on that very morning, about the invoice of Adelaar Bros. If such an invoice is so immaterial, means nothing, why did Benjamin Marco think that he had to lie about it?

Now, Hyman Karp, getting back to him for a moment. You recall that there was a private detective, Mr. Connell, who testified that on May 27, 1953 he had a conversation with Karp, in which he informed Karp that certain of the merchandise that he had received, namely a number of boys' zoot suits were believed to have been stolen, and were believed to have been manufactured here in New York City, and that at that time Karp produced a manufacturer's invoice—rather, an invoice of A. Finkel, which the Government placed in evidence as Government's Exhibit 212. You recall the date (1579) of the invoice being March 10, 1953, and you recall Stracuzza's testimony to the effect that sometime in the latter part of May 1953, after he had begun dealing with Karp, he received a telephone call, which I previously alluded to, and they had a conversation to the effect as to whether Stracuzza had protection. You recall that when Mr. Connell, the private detective, testified that Karp called A. Finkel in his presence and got no answer, I tell you ladies and gentlemen that he knew that he was not going to get an answer, because he knew that A. Finkel had gone out of business approximately two months before.

He also knew, as Agent Davidson has testified to you, that Tony Stracuzza, "Mr. T", was the same person with

which he had done business at A. Finkel, and that Tony Stracuzza had called him in the early part of May and told him that he had severed his connection with Berk and was operating under the same—was operating under a different name, A. Schafler.

This supposed clean breast of the affair concerning these zoot suits was a fraud on the part of Hyman Karp. He knew he wasn't going to get (1580) any answer from the telephone at A. Finkel, because he knew the place was out of business. He knew right then and there that the merchandise that he had received from A. Finkel was stolen.

Now Mr. Steinberg tells you that he kept books and records concerning his dealings with both A. Finkel and A. Schafler, and each of the defendants made payments by check, kept careful records, which they produced for the FBI, and so forth.

Let's not forget for a moment, which I am sure you are all well aware of, that there is such an organization known as the Internal Revenue Service, which makes a practice from time to time to call on businessmen and ask them to produce their books and records concerning their dealings. These defendants had to keep books and records to protect themselves from any accusation that might be made against them by the Internal Revenue Service. The fact that they kept books and records is of little or no weight. They had to have some record of their dealings with A. Finkel and A. Schafler.

But getting back to this invoice again of A. Finkel, Karp knew that the business had closed; that he was not going to get an answer, and therefore, (1581) after the detective left he had this conversation with Tony, in which he inquired as to protection, and he was assured by Tony Stracuzza at that point that he did have protection, and that Karp had nothing to worry about.

Do you believe if Karp was the honest businessman that he was supposed to be, that he would have continued to

do business with Tony Stracuzza, a man who had sent him stolen merchandise?

Now, back to Marco. You will recall at this conversation on July 28, with Agent Burke, when Burke walked into the office in the store of Marco and announced the reason for his presence, Marco had first said to him, "Well, I don't know what this is all about; this is all news to me."

And that after Agent Burke had examined the five cartons and made an inventory of what was contained in them, Marco said to him, "Well, I really know what this is all about because I received a telephone call this morning from Stracuzza's being arrested, arrested the day before."

Burke then told him that he believed that each of the cartons that Marco had received were (1582) stolen. Marco then said, "Well, I will send it all back."

Burke, however, didn't take him at his word, fortunately, because he made an inventory of what was contained in that carton, which we have offered as our Exhibit No. 203. Those notes reflect each and every item that were in those cartons, the two Schafler invoices No. 305 and No. 306. Burke later testified that on a subsequent examination at the freight terminal he found a number of items missing, which he noted in ink on the righthand side of each of those pages.

After finding that this merchandise had not been returned, he again went back to Marco, and Marco said to him, "Well, I admit that I didn't turn it all back; I held back some pajamas because I wanted to see that my freight charges were paid."

Thereafter Burke again went back to the store and found in different boxes some of the items that were originally in the cartons, 305 and 306, and he has not found to this day, the items that were in those 305 and 306 invoices.

Now, is that the act of an honest man, who was trying to cooperate with the Government?

(1583) Stracuzza has testified that his business dealings were initiated by a telephone call to Marco in the early part of June 1953.

In Marco's statement there is a statement to the effect that he did receive a telephone call from Stracuzza in the early part of June 1953, in which the name of Kusnick was mentioned. You have heard testimony from several of Marco's employees, in which they have stated that they recall a conversation with Marco to the effect that the business with A. Schafler was initiated by a telephone call, and that the name of Kusnick was mentioned as the person who recommended A. Schafler.

Now, we have attempted to trace, if you recall the testimony of Agent Miller, that a trash cover was made on the 23rd, 24th and 25th day of July 1953, at Stracuzza's office, that when Agent Miller was recalled to the stand, after all the other witnesses had testified, he then traced by means of the various schedules that were prepared the invoices that were found in the trash, and also several of the invoices that were found in the room on July 28, 1953, when the arrest was made; and I wish at this time to trace a number, (1584) several of those invoices for you now, to show how we were able to determine that this merchandise actually was stolen and how it actually got to the office or to the place of business of each one of these defendants.

Your Honor: I wonder if we might have a short recess?

The Court: Take a short recess.

(Short Recess.)

The Court: Proceed.

Mr. Moran (Continuing) Now, Agent Miller testified that the FBI first learned of this operation around the 1st of July 1953. As you realize now, the operation had been in effect since the early part of May 1953, at least so far as A. Schafler was concerned; that the A. Finkel operation had completely stopped, and that around the 17th of July

1953 Miller and the other agents began to make the surveillance of the office at 48 West 25th Street and continued there until the 28th of July 1953, when the arrest was made.

Miller also testified on one or more occasions that he followed Mario to various places in the Garment District and saw Mario purchase (1585) various cartions from drivers, and trailed Mario back from the point where he had met the driver to the office, and then went with him on one or more occasions to the freight station where he saw him deliver packages addressed to the three defendants, the Schaffers, Max Schaffer, Norman Schaffer, Benjamin T. Marco and Hyman Karp; and that the trash cover that was made in the course of this investigation revealed certain invoices or copies of invoices that had apparently come from Stracuzza's office.

Now, as far as those invoices are concerned, you recall that Anthony Stracuzza testified that when he sent a copy of the original manufacturer's invoice, what he did on most occasions was to cut off the top of the invoice and send the bottom half of the invoice to one of his customers. However, there were a few occasions when he sent the entire invoice, but merely obliterated or struck out in some fashion the name of the consignee, and he cut from the lower corner, either the left or righthand corner of the invoice, the invoice number. Most of these original manufacturers' invoices had more than one copy. Sometimes they (1586) had two; sometimes they had three. So what he did in that event was to send a portion or one entire copy with obliterations on it to the customer and retain in his possession until the bill was paid the other copy or copies, at which time when it was paid he would tear it up and throw it into the trash.

Now, Miller testified for you that on those three days, namely, the 23rd, 24th and 25th of July, he recovered and pasted together certain portions of the invoices that had been picked up out of the trash, and one of those invoices that were recovered on the 25th day of July 1953 was an

invoice that was marked and received as Government's Exhibit 177, which was an invoice of Grosmanfeld.

Now, you will recall when Agent Hutson was on the stand I had him compare for you the prices in this invoice, and all the other information that appears thereon with the photograph that he took in the New Penn Motor Express Company on the morning of July 28, 1953. I think if you will compare those, as far as the writing, the same lines, the way they appear upward from the lower left to the upper righthand corner, all the (1587) information is there on the invoice, with the exception of the consignee's name. If you look closely you will even find the name, or rather, the date of the invoice.

Now I ask you, considering again Tony Stracuzza's testimony, is this a lie, or has the Government corroborated the testimony of Anthony Stracuzza to this extent?

On the same day other invoices were recovered, which were pasted together, and they were received as two exhibits against the defendant Benjamin T. Marco. There were two invoices there of Roberta Dresses, which were received as 177-C and 177-D.

Now, if you will compare the returns on the search warrant, and the other items of merchandise, which Agent Burke made in his examination of the merchandise found in Marco's store, you will find a recovery of the same number of dresses under the same style number, and so forth, Roberta Dresses, that are reflected in these two invoices, and if you will compare the Marco invoice, rather, the A. Schafler invoice to Marco, you will find on that invoice the same style number, the same price (1588) and the same total price, and I ask you if the testimony of Anthony Stracuzza to the effect that he, as far as Marco is concerned, when he wrote his invoices, the A. Schafler invoices, when he says to you that he copied the same style number, the same unit price and the same quantity, is that testimony a lie or has the Government corroborated it?

Now, on the same day another invoice was recovered, and that pertains to the defendant Hyman Karp. That is an invoice of the Glamour Blouse Company, which has been marked here 177-F.

Now during the course of Agent Davis's testimony I had him compare for you the last known invoice received by Hyman Karp, which was invoice No. 293, and I had him direct his attention to the last item here, style No. 2472, 15 dozen at $22.08 a dozen, or a total of $331.20, and also to this invoice that was recovered in the trash on the 25th day of July 1953 by Agent Hutson, and there he compared for you this invoice, plus this invoice of Stracuzza, in which the same information as to style number, as to price and total price are reflected in this invoice.

(1589) I again say to you, has not the Government corroborated by its other witnesses and its own documents, other than the testimony of Anthony Stracuzza, that what he says to you pertaining to his dealings with these defendants, is essentially true, despite what inconsistencies you may have found or may have been pointed out to you during the course of his cross-examination?

Now, I have only taken one day. I don't think it is necessary to belabor the fact that on the 23rd and also on the 28th, when copies of invoices were found in the office, that they were traced to the various invoices that were sent to each one of the three defendants.

Thereafter, you heard testimony from the Pennsylvania Railroad man, Mr. Rule, and Mr. Groton, who was the assistant chief in charge of the freight claims section of the Pennsylvania Railroad, what the practice is of the Pennsylvania Railroad pertaining to merchandise that was lost in transit, that is delivered to the Pennsylvania Railroad for shipment from New York to various places outside of New York. A number of claim files were introduced at that time. Mr. Rule then went (1590) through each claim file and told you that as far as the Pennsylvania Railroad was concerned, that these records indicated that the mer-

chandise described in their claim folder was actually delivered to the 37th or 38th Street platform of the Pennsylvania Railroad, and that when those freight cars were opened at the place of delivery, the merchandise was gone; and that on the basis of the investigation made by the Pennsylvania Railroad, as reflected in these files, the Pennsylvania Railroad was convinced that a claim was legitimate and a payment was made.

We then presented four schedules, three of which pertain to Max and Norman Schaffer, one to Benjamin T. Marco, and one schedule here that pertains to Hyman Karp.

You recall now the testimony of Agent Hutson that in the course of his conversations with Norman Schaffer and the other employees in the store, that he was told that the merchandise that Schaffers of Lebanon, Pennsylvania, had received from the Stracuzzas had been given a code number "82," and that this code number was placed on each one of the garments that they had received.

(1591) Now, if you will look at any of the coats there on the rack, that have been introduced in evidence here, you will find in the lower lefthand corner a symbol, "82."

The next date or the next number was given to Agent Hutson to be the date that the merchandise was received. In other words, the 6th day of July, "68," and the invoice, rather, the price that Schaffers was going to sell it.

Now, what we have done in this chart, and the procedure was followed throughout, was to take this number that appeared on the green tag, or the tags that appear on each one of these garments, and trace by investigation with various manufacturers here in New York City—and we had six of them come to the stand here and identify each one of their coats. They were able to tell us that they made a shipment on a certain date; that they had documents to show it; that they had their bills of lading, and whatnot. We have then listed their invoice date, and invoice number, the number of items that they shipped under a particular invoice; the name of the legitimate customer or consignee,

and the number of items that were (1592) received by Schaffer, and the date that Schaffer received them, and in the final column here, on the right, the particular claimfile of the Pennsylvania Railroad.

By this means we were able to identify the merchandise as far as it pertains to those coats and other items that are reflected in this schedule. Now, the same information is reflected in the other three schedules, and I think you have a general idea of what we have done here in tracing this merchandise.

Now, a claim has been made, or an argument has been made to you that this arrest occurred in 1953, and why has the Government taken all this time to bring these people to trial? One reason is that the enormous quantity of merchandise that was recovered in this case required an intensive investigation by the FBI. All we had was a symbol on a coat, without knowing the name of the manufacturer. We had to bring in all the manufacturers from New York City, ask them if they could identify it, if they could could they tell us whether they had a loss on a particular date. Now, that takes an awful lot of time. That is (1593) the principal reason why this case has been delayed. But whether it has been delayed or not is not something that need concern you. The only thing that need concern you is the guilt or innocence of these defendants that are on trial before you.

Now that essentially is the case that the Government has presented to you.

I fully realize, and as you probably do, too, the Government doesn't have a choice of its witnesses in a good many of its cases. It would be nice if we could call FBI agents, and those were the only type of people we could call. Unfortunately, we can't do it. We have to call people who sometimes are no better and sometimes a lot worse than the defendants on trial. It is up to you, having seen them, to weigh their testimony, to consider their answers, how they have answered them in cross-examination, to come to some decision as to the guilt or innocence of the defendants.

Now, we have shown you three exhibits that we have produced here that the testimony of Anthony Stracuzza, to the extent of his dealings with these defendants; under the name of A. Schafler, (1594) is correct, because we have traced for you, and if you will examine these invoices that were found in the cartons, you will see a number of invoices where the top half is there, the bottom half is missing, and if you want to trace from these various packages in which invoices are contained, you will be able to trace from those various pairs to a particular invoice of each one of the defendants.

Getting back for a moment to the statements of each of the defendants, you have the statement of Max Schaffer on the day that he talked to the agents in the office of Anthony Stracuzza that afternoon. You have heard through the summary of Agent Mabes, that Schaffers in Lebanon, Pennsylvania, had purchased over $60,000 worth of merchandise prior to the 28th day of July 1953; that Max Schaffer had known Tony Stracuzza for almost a year prior to the time—over a year prior to the day that he was interviewed by the FBI. He had come up there, either to A. Finkel's office, to A. Schafler's office or to Berk and Eisenberg's office, every week or every ten days. Yet, when he was questioned by the FBI on that day he denied that he knew him or did any business with him.

(1595) Now, I ask you, is that the statement of an honest, upright citizen of the community, who we look forward to as our leader in a situation that we face today? Or is it the statement of a man who is caught, and just like Stracuzza, when he was arrested on the day, he lied to the FBI, just like Max Schaffer did.

And also Norman Schaffer, when the FBI asked him about those invoices that they had photographed, did he tell them the truth? He hadn't seen those cartons, but he lied about it, because he knew that if the agents had ever gotton hold of those invoices, his goose would have been cooked. He cooperated, sure he cooperated with the FBI,

because he did not realize, as Max Schaffer did not realize, that the motion picture that they had taken in the office on the morning of July 28, 1953 completely corroborated Stracuzza.

Now, he has testified that Max and Norman Schaffer came up every week or ten days. The Chinese have a saying that a picture is worth 10,000 words. I ask you, having looked at that motion picture, if that doesn't corroborate Anthony Stracuzza one hundred per cent, insofar as his (1596) dealings with Max and Norman Schaffer are concerned?

Now, as far as Hyman Karp is concerned, he had direct knowledge that A. Finkel had sent him stolen merchandise. Yet he persisted in dealing with the same man whom he had dealt with under the name of A. Finkel, when Tony Stracuzza sent him merchandise under the name of A. Schafler. He asks you to believe that he did not know the merchandise was stolen. I say to you that we have corroborated Anthony Stracuzza to the extent that we showed you in the carton of merchandise that was found in the office on the 28th day of July 1953, that that carton contained original invoices of the manufacturers, and that I think you can believe, on the basis of the evidence that we did show you, that each and every one of those shipments that were sent to Karp had original invoices in them.

Now, as far as Marco is concerned, he finally, after a number of interviews with Agent Burke, admitted that the person who called him on the morning of July 29th, was Sol Eisenberg, a name you have heard all throughout this case. He also denied at any time that any of this merchandise that (1597) he received, that he or any of his employees cut labels, removed labels. You have also heard the testimony of one of his own employees, who stated that he had received the labels from Kusnick sometime in 1951, and that Kusnick recommended Anthony Stracuzza.

You have heard Stracuzza testify that Kusnick was one of his own customers, and that Kusnick was one of his, Berk's and Eisenberg's customers back in 1951.

I say to you that on the basis of all the evidence the Government has produced in this case, that we have met the standard imposed upon us, namely, that the guilt of each and every one of these defendants has been established beyond a reasonable doubt—beyond any doubt—and I think in carrying out your oaths as jurors, you can safely and properly return a verdict of guilty as against all four of these defendants.

Thank you.

The Court: Ladies and gentlemen, we will adjourn now until tomorrow at 10:30, at which time I will charge you.

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(1624) **CHARGE OF THE COURT.**

The Court: Ladies and gentlemen of the jury:

I want to join with the lawyers and thank you for your very obvious courtesy and attention. I want to thank you, too, for being so punctual, and to congratulate you on being so healthy.

We have now arrived at the most important part of the case, and that is the part in which you are going to decide whether each defendant is guilty or not guilty of the crime charged in the indictment against him. I know that you will approach that problem with all of the seriousness that you can muster, because service as a jury man or woman is one of the great American civic duties, and I know you will approach the problem without sympathy or bias or prejudice. I suggest to you that you analyze the facts the same as you would want twelve (1625) other people to analyze the facts in which you were involved, or in which you think the American people are entitled to have you analyze the facts.

Now, the posture of the case as it is being submitted to you today is, as I explained to you on Thursday, considerably different than when it started. The only questions that you are concerned with are the guilt or innocence of each defendant as they are separately charged in Counts 1, 2 and 3 of the indictment, No. 145-232.

Bear in mind that an indictment is merely an accusation of a crime and never is it any evidence of the commission of that crime.

There is no charge of conspiracy between the defendants and anybody else. I removed that accusation from the case.

You are limited, in fact you are required to consider the evidence against each defendant separately and as it relates to him under the particular charge of which he stands accused. That is, you are not to take into considera-

tion any proof against one defendant and apply it by inference or otherwise to any other defendant. In short, even though there are four defendants on trial, (1626) as against each you must consider only the evidence that relates to him, and not view it as a sum total of all the evidence merely because they are charged in one indictment and have stood trial together.

The fact that Max and Norman Schaffer are partners doesn't give you the right to consider evidence against one as evidence against the other.

Now the charge against each defendant, together with the three Stracuzzas, Anthony, Mario and Dorothy, is substantially the same, except for the dates and the places between which the transportation is alleged to have been had, for example, that the three Stracuzzas and each defendant transported or caused to be transported in interstate commerce merchandise having a value in excess of $5,000, knowing the same to have been stolen.

With regard to Count 1, which relates only to the three Stracuzzas and to Max and Norman Schaffer, the dates are May 15th to July 27th, 1953, and the transportation is alleged to have occurred between New York and Lebanon, Pennsylvania.

Count 2, which relates to the three Stracuzzas and the defendant Benjamin T. Marco, (1627) the dates are June 11th to July 27th, and the places, New York and Bluefield, West Virginia.

Count 3 relates to the three Stracuzzas and the defendant Hyman Karp and the places are New York and Fall River, Massachusetts.

Each crime that is charged has the same elements, and the burden of proving each element against each defendant is on the Government. Those elements are:

(1) Were the goods in fact stolen?

(2) Did the defendants know that they were stolen?

(3) Did they wilfully and knowingly transport or cause to be transported such merchandise; and

(4) Was the value of the goods $5,000 or over?

Now, as I recall the evidence—and bear in mind that my recollection of the facts is not controlling; your recollection is supreme—Anthony Stracuzza, who has pleaded guilty to this indictment and to another similar indictment, but who has not been sentenced, testified that for a period commencing some time in 1952, up to the day of his arrest on July 28, 1953, he was engaged in the business of (1628) selling stolen merchandise and lending money at usurious rates. He went into the stolen merchandise business, he said, at a small salary to start, and a sort of commission man or, as he put it, a 10 per cent man, and then later for his own account.

Prior to getting into this nasty business, he said he worked in the trucking industry for a number of years and had gambled successfully. He said he also pleaded guilty to stealing two packages that were moving in interstate commerce and received a suspended sentence from Judge Ryan. This theft took place in May 1956.

He testified that he met each of the defendants in 1952, in an office building operated by Sol Eisenberg, where he was working, changing tags on garments that would be brought in by truckdrivers. He also put the merchandise in cartons, he said, and shipped them and sometimes delivered them to customers.

He testified further that he was associated in the same business at 1133 Broadway, under the name of A. Finkel, from September '52 to March '53 with Hyman Berk and his own brother, Mario.

He said he maintained a bank account under (1629) the fictitious name of Charles Santangelo.

He said it was his practice to pay the truckdrivers 45 per cent of the manufacturer's invoice price for the goods, selling it for 55 per cent and splitting the 10 per cent profit with his brother.

In May of '53, he said he went into business under the name of A. Shafler, at 48 West 25th Street, and con-

tinued until July 28, 1953. It was his testimony that he sold ladies' and children's garments to each of the defendants, which he and his brother bought from truckdrivers, and shipped such merchandise by Railway Express or by U. S. Packing.

He sold the merchandise to the Schaffers at 65 per cent of the manufacturer's invoice price; to Marco at 60 per cent, and to Karp at 55 per cent.

He testified that he would copy the manufacturer's invoice on his own printed invoice, copying the style number and the price, and that he would enclose the manufacturer's invoice with his own after he scribbled out, as he described it, the name of the consignee and the manufacturer, although he said the bottom of the invoice usually had the manufacturer's name on it and was still (1630) legible.

He explained he kept a copy of the invoice he sent out in a sort of a ledger, and he described how he would cross out the entry when the bill was paid.

As to the defendants Marco and Karp, he said he also kept a sort of notebook copy of the invoices he sent to them. He admitted that he did not tell any of the defendants, or for that matter any of his customers, that the goods were stolen.

A number of FBI agents testified concerning surveillances that they had made and conversations they had had with the defendants, and the Government has introduced written statements signed by such defendants.

Mr. Miller testified to the surveillance that he and other agents conducted of the premises of Anthony Stracuzza, the collection and piecing together of rubbish from this premises; the activities of Mario Stracuzza and his red truck, and the scene on the premises on the day of the arrest of Stracuzza on July 28. Toward the end of the trial he was recalled and identified certain schedules and inventories of goods that were found on (1631) the defendants' premises, and traced the identity of some of the garments by the identity of similar style numbers on manufacturers' invoices.

The Government also called certain former employees of the defendant Marco, who testified to conversations he had with them, and other employees, and to the absence of labels on some garments and the sewing in of labels on others.

The Government also called certain employees of the Railway Express, who identified their files in connection with the proofs of loss and the payment to the different manufacturers. Some of the manufacturers were called, and they identified their garments, and all of the counsel for the defendants and the Government have entered into a rather detailed stipulation. These stipulations have been read to you, and in substance it has been agreed that the aggregate value of the merchandise purchased by each defendant during the time charged in the respective counts of the indictment was over the sum of $5,000, although no particular shipment on any one day equaled that amount, but in fact was less than $5,000.

The defendants and the Government further (1632) agreed that if the manufacturers were called, they would be able to identify their respective garments as having been manufactured by them or by one of their contractors, but they would be unable to identify a specific garment as being the specific garment shipped under a specified invoice.

They also agreed that the railroad employees, if called, would identify the claim file relating to specific shipments, and that such files were records kept by the railroad in the regular course of its business.

None of the defendants took the stand in his own defense. In this connection I charge you that you cannot draw any inference from their failure to take the stand, nor can you even discuss it in your deliberations in the jury room. They are entitled to a presumption of innocence, and the burden of proof is on the Government throughout the trial and never shifts at all to any defendant.

In connection with the elements of the crime that is charged, one of the principal elements is that of knowledge.

In order for the Government to prove its case it must show beyond a reasonable doubt that each of the defendants knew that the (1633) goods they purchased were stolen goods. The Government argues that it has sustained its burden on this element of the crime by circumstantial evidence.

You will recall that Stracuzza testified that he did not tell any of the defendants that the goods were stolen, although he testified that all the goods he sold were in fact stolen. The Government claims that the circumstantial evidence from which you can properly draw the inference against each defendant is the sum total of a number of different facts and circumstances.

For example, as against all the defendants, it says that the manufacturers' invoices, which Stracuzza says were included in the shipments, were an obvious indication that the goods were stolen, because of the manner in which they were obliterated or torn; also, that the prices that the defendants paid were so out of proportion to the true market value, and that the copying of the style numbers from the manufacturer's invoice was a further indication.

It says, as to those defendants who were actually in the premises of Stracuzza, they must (1634) have known or at least should have known from the condition of the premises and the manner of the display of the goods that they were not legitimate, but stolen.

As against both Schaffers, the Government argues that both were present in the premises, and both must have seen the invoices when they arrived in Lebanon, in the boxes, except of course that Max Schaffer could not possibly have seen the boxes that arrived on July 28, since he was in New York.

The Government says that both Schaffers came to the premises pursuant to a request that Stracuzza made to both of them when he met them on 40th Street. It also claims that the statement that Max Schaffer made on the day that Stracuzza was arrested, which it claims was a

false statement, is also indicative of guilty knowledge on the part of Max Schaffer.

As to the defendant Marco, who Stracuzza said was in the premises on 25th Street three times, the Government argues that Marco knew the goods were stolen because of Stracuzza's phone call to him in June of 1953, saying that he was recommended by Fred Kusnick. The Government also asks you (1635) to imply knowledge from the letter that Marco wrote to Stracuzza.

As to the defendant Karp who, according to Stracuzza's testimony, was never present in the premises on 25th Street, the Government argues that he had knowledge because Stracuzza telephoned him in May of '53, identifying himself as "Tony from 33rd Street", and Karp's question to him, whether or not he had protection in New York, as he did not want to get into any trouble. This conversation, according to the Government's argument, was in May of '53, at the time of the zoot suits question.

Another circumstance, the Government says, is indicative of knowledge insofar as Karp is concerned, is that Stracuzza testified that once when Karp was going on vacation, he told Stracuzza to keep sending the shipments.

Consequently, the facts and the circumstances relating to each defendant can be considered by you in determining whether or not each defendant knew that the goods were stolen.

In this connection, every fact and circumstance must be scrutinized by you to determine whether they are sufficient to cause an actual belief on (1636) each defendant's part that the goods were stolen. The defendants, on the other hand, argue that no inference can reasonably be drawn from any of the facts and circumstances in this case, that any defendant knew that the goods were stolen.

Each defendant argues that when confronted by the FBI he voluntarily assisted and helped in making inventories, in turning over invoices and other records, and

actually returning the goods, and that such actions are not the actions of a person who knew the goods were stolen.

In connection with the defendant Karp, it is argued that when he went to the private detective, he didn't have to go and he voluntarily went and he voluntarily secured the invoice and the check to prove that he bought the zoot suits without knowledge. He said that this is indicative of his ignorance of the illegitimate source of the goods.

He also argues that since the FBI found no manufacturer's invoice in his trash, that that was indicative of the fact that he received none, and hence could not be put on any notice of any kind.

In connection with the defendant Marco, it is argued that the fact that he returned a large (1637) quantity of goods before Stracuzza was ever arrested is indicative of the actions of a person dealing in good faith with a supplier, without knowledge of the fact that the goods were stolen.

In connection with the letter he wrote on the hotel stationery, it is argued that that too was indicative of the absence of any criminal knowledge, because that is where the man lived. He argues, too, that the purchase of Donnybrook clothes from the Donnybrook manufacturers is also proof of his lack of guilty knowledge.

In connection with the testimony that he told certain of his clerks that the goods were stolen, it is argued that this is attributable to his humorous nature.

Defendant Max Schaffer argues that the statement he made to the FBI is not indicative of guilty knowledge, but it was a foolish thing to do, that many innocent men say foolish things when confronted suddenly.

Both Schaffers argue that since Stracuzza kept no duplicate invoice book for them, that fact is indicative of the fact that Stracuzza never sent them any mutilated invoices; and the Schaffers were (1638) so honest there was proof in this case showing that they corrected an invoice to the benefit of Stracuzza, rather than have him short-change himself, and that that should create in your mind

the fact that they had no guilty knowledge, and no inference can be drawn, they argue, because of the price of the goods, since that is quite common with this type of merchandise, and the cutting of prices was the real basis for honest competition among businessmen.

In short, they all say that all of the inferences from all of the facts point to complete innocence, and that each had no knowledge that the goods were stolen.

One of the other elements of the crime charged against each defendant, and an important element, since without it the crime does not rise to the dignity of a federal crime, is that the Government must prove that the shipments of the stolen merchandise were in excess of the value of $5,000. In this connection, the stipulation between the attorneys states that the total shipments covered by each count are in excess of $5,000. (1639) The statute that Congress passed says, "The aggregate value of all goods and merchandise referred to in a single indictment shall constitute the value thereof." This means that under each count addressed to each defendant and to the Schaffers jointly, you may rely on the stipulation, in so far as value is concerned, that the value of the goods and merchandise exceeded the sum of $5,000, even though no individual shipment was of a value that high.

The stipulation made as to the value of the total shipments during the times in question does not mean that the attorneys have agreed that the goods were stolen, or that they knew it was stolen. Those are two elements that the Government has to prove, and you have to be satisfied on.

There is also a question whether each defendant transported or caused to be transported merchandise in interstate commerce. It appears to be undisputed as to each defendant that shipments were seized in Lebanon, Pennsylvania, Bluefield, West Virginia and Fall River, Massachusetts. One of the questions you must decide is whether each of the defendants wilfully and knowingly transported or (1640) caused to be transported the goods between New York and the cities where they each were in business.

A person may be held to be a principal under the federal law when he aids or abets or counsels or commands or induces or procures the commission of an offense against the United States. Congress has said that whoever wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Now, in an effort to help you come to a conclusion on these issues, there are certain rules which are the result of centuries of experience and which are designed to assist you in your very important duty as jurors, and one of these first rules is that you ladies and gentlemen and you alone are the sole judges of the facts, the credibility of the witnesses and the weight to be given to their testimony. What counsel for either side have said, in fact what I have said, has no bearing or relevancy on it. You and you alone are the sole judges of the facts. As a matter of fact, what rulings I have made during the trial or on questions of evidence are my (1641) concern and not yours, and I hope it didn't indicate to you how I feel about the case, either as to the law or the facts. I have no feeling, and you should disregard my rulings completely.

Now, how do you determine the credibility of witnesses? You do that by the same standards that you apply in determining the credibility of anyone that you talk to in your day to day affairs. It doesn't mean that we are passing necessarily on whether that person was lying or was truthful, although it may be that. Credibility is something more. You and I frequently decline to believe someone we would not accuse of lying. We decline to believe him or her because we doubt his or her accuracy of recollection, or because we think he or she has a bias or an interest which, quite unintentionally, and even perhaps unconsciously, colors his or her views or slants his or her judgment.

You can consider the conduct of the witnesses on the stand. Were they frank or evasive? Were they biased

or impartial? Were they interested in the result? What relationship did anyone have to another? Did any one of them testify falsely to a material fact?

(1642) If you find that a witness testified falsely to a material fact, you may disregard the matter that you do not believe and accept the rest which you do believe. You may consider the strength or weaknesses of the witness' recollection, and you may accept what you believe of a witness' testimony and reject what you do not believe. The test of credibility applies in this case to all the witnesses you have heard.

There was also the matter of corroboration. A witness is said to be corroborated when his or her testimony, either in whole or in part, is supported either by the testimony of another witness, in substantial agreement with him, or by other circumstances pointing to the truth of his or her testimony. In many courts in this country there is a requirement of law that the testimony of an accomplice must be corroborated in order to convict the defendant on trial. No such rule exists in the federal court. I nevertheless caution you to scrutinize carefully the testimony of the witness Stracuzza.

Now, it has been argued by some of the (1643) counsel that the failure of the Government to call certain witnesses may give rise to the inference that the witness, if called, would have testified unfavorably to the Government. I charge you that no such inference can be drawn by you, where both sides had the same opportunity of calling a witness, and the witness or witnesses were available to both sides. There is no presumption against the Government for its failure to call witnesses, when you are satisfied that the testimony would be merely cumulative or repetitious, and no greater value than that of the witnesses who have testified.

You are also instructed that the question of possible punishment of a defendant, in the event there is a conviction, is of no concern of the jury and should not in any

sense enter into or influence your judgment. The duty of imposing sentence rests exclusively on the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of each defendant solely on the basis of the evidence. Under your oath as jurors, you cannot allow a consideration of punishment which may be inflicted upon a defendant if he is convicted to influence (1644) your verdict in any way.

Now a word about the burden of proof, and this is most important. A defendant is presumed to be innocent. The fact that he has been accused of a crime by a grand jury does not destroy that presumption. The burden of proof, in the sense of the responsibility of persuading you ladies and gentlemen of the jury, rests upon the prosecution. The quantum or measure of that proof necessary before you can lawfully find the defendant guilty is referred to as proof beyond a reasonable doubt.

By "reasonable doubt" I do not mean a possible uncertainty. Proof beyond a conceivable doubt cannot be attained in a world of actuality. Neither is reasonable doubt any decision, arbitrarily reached by a juror because of reluctance to perform an unpleasant task. Nor is it disbelief based upon the natural sympathy that we all have for others. A reasonable doubt most nearly signifies one which an average person of ordinary prudence has after carefully weighing all the evidence. By weighing, I do not mean balancing according to the weight of testimony or number of witnesses or exhibits, but rather a determination based upon (1645) a convincing force of the witness' testimony. You must be governed by the quality and not the quantity of the proof.

If the prosecution has sustained its burden on the issues of fact which I have already explained to you, you may lawfully find the defendants guilty. Otherwise, you cannot. If you find that the evidence respecting a defendant is as consistent with innocence as with guilt, the defendant should be acquitted.

If you find the law has not been violated, you should not hesitate for any reason to render a verdict of acquittal. If, on the other hand, you find that the law has been violated, as charged, you should not hesitate because of sympathy or because of some other reason to render a verdict of guilty, as a clear warning to all that crime, as charged here, may not be committed with impugnity.

I am sure you know that your verdict must be unanimous as to each defendant, under each count. Of course, each juror is entitled to his or her own opinion on the facts. Yet it does not follow that such opinions shall not be changed by conference in the jury room. The object of the jury system is to secure unanimity by a comparison of views of (1646) the jurors. So each juror should listen with an open mind to the opinions and arguments of the other jurors.

You know, of course, I am sure, that you may have at your request any or all of the exhibits.

Are there any exceptions, gentlemen?

Mr. Steinberg: If your Honor please——

The Court: Just say yes or no, please.

Mr. Steinberg: Yes.

The Court: All right, under our rules we have to do this out of the jury presence, so will you please excuse us.

(The following took place in Judge Murphy's robing room:)

Mr. Steinberg: First I would like to say on the record that I think the charge was extremely fair, and we thank you for it.

The Court: All right.

Mr. Steinberg: There are only a few things I would like to point out to your Honor.

Under C, the request on behalf of all of the defendants, your Honor did not charge that if the jury find that Anthony Stracuzza has testified falsely to any material fact, they may disregard his testimony (1647) in its entirety.

The Court: Didn't I charge that with regard to any witness?

Mr. Steinberg: No, sir; I don't think so.

The Court: I will not mention it by name.

Mr. Steinberg: We should have added "wilfully," if your Honor please. We left that out.

The Court: Yes, I thought I did.

Mr. Steinberg: Then, specifically, I except, just to sharpen the issue of law that I think exists, to your Honor's failure to charge 7 and 8 in that category. Do you want to look at those?

Mr. Coleman: I don't think 7. I think 7 has been eliminated, but 8.

The Court: 7 was eliminated on the original.

Mr. Steinberg: Yes, 8.

The Court: Yes, you may have an exception as to that. That is on the question of value.

Mr. Steinberg: Yes, because your Honor is taking that view, and we just want to save our exceptions.

Otherwise, I thank you for a very fair and impartial charge, your Honor.

(1648) Mr. Coleman: Those exceptions were for all defendants.

The Court: The exceptions that Mr. Steinberg made are for all of the defendants. They run to the benefit of all defendants.

Mr. Katz: Will your Honor be back in your office after the jury retires?

The Court: Yes, I have another case coming right on, but I will be right here.

Mr. Katz: I wanted to take a matter up with the Court.

The Court: Yes, I will be right here.

(The following took place in the courtroom in the presence of the jury:)

The Court: I was reminded, ladies and gentlemen, that I didn't tell you that when you analyze any witness' testimony, if you find that that witness testified wilfully and falsely to a material fact, you have the right to disregard his entire testimony. You can accept and reject any part you want, or reject it completely.

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(1651) (At 2:20 P. M. the following took place in the courtroom:)

(Jury in box.)

(Roll call of jurors.)

The Clerk: Ladies and gentlemen of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: And how do you find?

The Foreman: We find the defendant Max Schaffer guilty as charged. We find the defendant Norman Schaffer guilty as charged. The defendant Benjamin Marco guilty as charged. The defendant Hyman Karp guilty as charged.

The Clerk: Ladies and gentlemen of the jury, please listen to your verdict as it stands recorded: You say you find the defendant Norman (1652) Schaffer guilty, Max Schaffer guilty, Hyman Karp guilty, Benjamin T. Marco guilty, as charged, and so say you all?

(Jury nodded assent.)

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Mr. Steinberg: If your Honor please, we would like to renew our motion for an acquittal at the present time, and also for a new trial on behalf of all defendants.

(1653) The Court: For a new trial based upon the same reasonings?

Mr. Steinberg: Yes, sir.

The Court: Well, I want a little time to think about that. So what I will do is to postpone the date of sentence for some reasonable time.

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(1660) The Court: The first order of business is the motions that are pending. I understand there are two motions.

Mr. Moran: Two motions. As I understand, a motion to set aside the verdict, or, in the alternative, to grant a new trial made on behalf of the Schaffers, Marco and Karp.

The Court: I have read the briefs on that, gentlemen, and I must say that it is not free from doubt. I am going to deny the motions and give an exception to each defendant.

Now, is everybody ready for sentence?

Mr. Moran: Yes.

The Court: Do you want to be heard?

Mr. Moran: Yes. As your Honor knows, the defendants Max Schaffer and Norman Schaffer, Benjamin T. Marco and Hyman Karp were convicted by a return of the jury's verdict on the indictment, and the defendants Anthony and Mario Stracuzza are here for sentence on three indictments, 145-232, 145-233, and 145-234.

First of all, a word as to the defendants Mario and Anthony Stracuzza. As your Honor will recall from the testimony at the trial of the defendants Schaffer, (1661) Marco and Karp, the defendant Anthony Stracuzza testified as a witness for the Government. He also testified as a witness for the Government in the trial held in December, 1947. There certain defendants named in indictment 145-234 were brought to trial. Mario Stracuzza also testified as a witness for the Government in that case. Both Anthony and Mario Stracuzza have cooperated with the Government since 1953, shortly after their arrest. It is the Government's representation to the Court that they have materially aided the Government in the prosecution of this case and the case in 1957 involving the truck drivers.

Of course, your Honor has a full pre-sentence report concerning the activities of both of these defendants, and I am sure that pre-sentence report will indicate that both the Stracuzzas during the time covered in these indictments received merchandise in the aggregate of well in excess of a hundred thousand dollars. To what extent they profited is hard to estimate, except for the fact that they have told us that they sold the merchandise at varying amounts from 55 to 70 per cent of the wholesale price, having paid anywhere from 33⅓ per cent to 45 per cent of the (1662) wholesale price to the truck drivers.

As far as the defendants Max and Norman Schaffer——

The Court: You are now going to another subject. I am a little confused. The probation report says that Mario pleaded on 11-25-57 in Special Sessions to a charge of petit larceny, pleaded guilty, and scheduled or was scheduled to be sentenced on January 27, 1958. What happened to that?

Mr. Moran: That is the sentence, I believe, which was originally scheduled to be imposed under 145-234, the indictment involving the truck drivers.

The Court: This is a New York City charge.

Mr. Moran: New York City.

The Court: The Court of Special Sessions. In November he took a plea and was to be sentenced in January of this year.

Mr. Wilkes: You are quite correct. It is a matter separate from this one. His sentence is presently scheduled before Judge Schweitzer to take place on June 11th.

The Court: Did they indict him for some crime?

Mr. Wilkes: He originally had been indicted there for grand larceny in the second degree, which was (1663) reduced to petit larceny, and that is why the sentence is before Judge Schweitzer still.

The Court: That has been carried over for a year or so?

Mr. Wilkes: It has been adjourned and now the sentence is to take place on June 11th.

The Court: Were they waiting there for this case to terminate?

Mr. Wilkes: That is correct.

The Court: I take it that crime related to a period of time that he was cooperating with the FBI in this case?

Mr. Wilkes: During the period of the cooperation. That is right. After the acts which are the subject matter of the indictment before you. They made a raid on a house over in Brooklyn in June of 1957, his brother's home, not the brother who is a co-defendant here this morning.

The Court: All right.

Mr. Moran: As far as the defendants Max and Norman Schaffer are concerned, your Honor, the Government's proof at the trial, if you will recall, indicated that Schaffer's Women's Apparel Shop in Lebanon, Pennsylvania, received approximately $19,000 (1664) of stolen merchandise during the period of time that the Schaffers were dealing with the Stracuzzas under the alias A. Schafler.

The Court: I am familiar with that.

Mr. Moran: The only other thing that I would point out to your Honor is the fact that in addition to their dealings with the Stracuzzas and Berk and Eisenberg, the Schaffers also did business with Jerry Newman, who was also convicted here in the Southern District of New York for running an operation similar.

The Court: That is in the probation report.

Mr. Moran: And also back in 1951 they purchased approximately $44,000 worth of stolen merchandise from a group of individuals who were convicted in General Sessions here in New York City.

As far as the defendant Benjamin T. Marco is concerned, he likewise had business dealings with Jerry New-

man at a point subsequent to the transactions that he had with the Stracuzzas. Newman, of course, was convicted here, as I say, in the Southern District Court for running an operation similar to the Stracuzzas. And the defendant Hyman Karp, likewise, had business dealings with Jerry Newman, in addition to his dealings (1665) with Berk and Eisenberg.

All told, as far as we are able to gather from the investigation made by the FBI, the stolen merchandise in the aggregate involving these defendants and other customers of the Stracuzzas was somewhere in the approximation of $250 during the entire period of 1952 and 1953. That is all I have to say to the Court at this time.

The Court: Did you know that one of the defendants, Marco, was convicted in this court?

Mr. Moran: That would be in the probation report.

The Court: All right, I will hear from the defendants.

• • •

(1670) The Court: Does any other gentlemen wish to be heard?

Mr. Coleman: Your Honor, in respect to Norman and Max Schaffer I know that you have a full probation report. I will say that I have had character witnesses write letters to your Honor's attention.

(1671) The Court: I received a large number of letters on behalf of both of these men and the other defendants, except the Stracuzzas, and I received personal visits to the office and telephone calls. Everybody has taken the same position you are now saying, that they have many friends who speak high of them.

Mr. Coleman: Outside of the family record, which is in the report, Norman's service record is excellent. I believe your Honor has full and complete information.

The Court: I really don't understand Norman Schaffer, a man with a good education and in the service——

Mr. Coleman: May I say, your Honor, the jury's verdict speaks for itself. I would have this comment to say in answer to your Honor, that I do not believe that this court of justice or any court of justice will ever hear again from Norman Schaffer and Max Schaffer. I feel certain and confident of that.

The Court: Well, gentlemen, I think it is a very serious crime.

Mr. Moran: Your Honor, I would ask you to inquire of each of the defendants if they have anything (1672) to say in their own behalf before you impose sentence.

The Court: Why? Is that some standard form?

Mr. Moran: As I understand the rules, your Honor, it is mandatory and there have been cases on the point.

The Court: Well, addressing myself to all of the defendants, have any of you anything to say?

(The defendants responded in the negative.)

The Court: Well, the judgment of the Court is that the defendants Schaffer and Karp be sentenced on the one count that they were convicted on to a term of two years and each fined $10,000. The defendant Marco is sentenced to a term of four years and fined $10,000. The defendants Stracuzza on indictments 145-232, 145-233 and 145-234 are sentenced each to a term of five years to run concurrently and the execution of those sentences are suspended and they are each placed on probation for five years.

Now, if you make an application for bail I will grant it to the defendants.

Mr. Moran: I would suggest that bail be in the same amount as to all defendants.

The Court: Can't they have the bondsman rewrite the bonds to cover the appeal?

(1673) Mr. Moran: It is a question of the amount. We would request that bail be increased to $10,000 for all of the defendants so that they all stand under the same bail.

The Court: Is there a difference between them?

Mr. Moran: I think as far as I can remember, your Honor, Marco is under a $10,000 bond and the others are under a $5,000 bond.

The Court: I won't increase the bail. They have all shown up here. But there should be an application. Would you speak on behalf of all, Mr. Steinberg?

Mr. Steinberg: May I ask one question before I do that. You recited a series of sentences and you suspended as to some. Your only suspensions were with regard to the Stracuzzas?

The Court: Yes. There are jail terms for the others.

Mr. Steinberg: Has your Honor fixed ideas on that?

The Court: The two Schaffers, Marco and Karp are placed in the custody of the Attorney General for the periods of time I have indicated. I said I will grant bail if you make the application.

(1674) Mr. Steinberg: We do apply for bail in the same amount as heretofore for these defendants.

The Court: Motion granted.

* * *

[fol. 265]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C. 145-232

C. 145-233

UNITED STATES OF AMERICA,

vs.

ANTHONY STRACUZZA, MARIO STRACUZZA, DOROTHY STRACUZZA, MAX SCHAFFER, NORMAN SCHAFFER, HYMAN KARP and BENJAMIN T. MARCO, Defendants.

Transcript of Hearing—April 21, 1958

Before: Hon. Thomas F. Murphy, D.J., and a jury.

New York, April 21, 1958;
10:30 o'clock a. m.

APPEARANCES:

Paul W. Williams, Esq., United States Attorney, for the Government; By John T. Moran, Jr. Esq., Assistant United States Attorney.

Irving W. Coleman, Esq., Attorney for Defendants Max Schaffer and Norman Schaffer.

Harris Steinberg, Esq., Attorney for Hyman Karp.

Jerome Katz, Esq., and Paul Rutheiser, Esq., Attorneys for Defendant Benjamin T. Marco.

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[fol. 329] ANTHONY STRACUZZA, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

By Mr. Moran:

Q. Where do you reside, Mr. Stracuzza?
A. I reside at 638 Straight Path, West Babylon, Long Island.
Q. How long have you lived there?
A. Seven years.
Q. Do you own a home?
A. Yes, I do.
Q. How long have you owned that home?
A. Seven years.
Q. How old are you?
A. Thirty-eight.
Q. Are you married?
A. Yes.
Q. Do you have any children?
A. One child.
Q. Is it a boy or a girl?
A. A boy.
Q. How old is he?
A. Thirteen.
Q. Are you employed at the present time?
[fol. 330] A. Well, no. Right now I am laid off.
Q. What was your employment before the time that you were laid off?
A. Working at Locar Trucking, in Hicksville.
Q. That is in Hicksville, Long Island?
A. That is correct.
Q. How long were you employed by them?
A. One year.
Q. When were you laid off?
A. Around March 10th of 1958.
Q. For what reason?
A. They closed up; they went out of business.
Q. Have you ever been convicted of a crime?

A. Yes, in September of 1956.
Q. In what court?
A. In this Federal court here.
Q. What was the offense for which you were convicted?
A. For interstate theft.
Q. Were you convicted on any other charge after that?
A. Yes, in November of 1953, of conspiracy of merchandise moving in interstate theft.
Q. Was it a conspiracy to steal merchandise moving in [fol. 331] interstate theft?
A. Yes, it was.
Q. Have you been sentenced for that offense?
A. No, I haven't.
Q. You are also named as a defendant in the two indictments with these defendants on trial, are you not?
A. Yes, I am.
Q. Have you been convicted on those two indictments?
A. No, I am not.

Mr. Steinberg: I am sorry. I didn't hear that.
The Court: He said, "No, I am not."

Q. Did you plead guilty to both of those indictments?
A. Yes, I did.
Q. Have you been sentenced on those two indictments?
A. No, I haven't.
Q. You are awaiting sentence; is that correct?
A. Yes, I am.
Q. Now, in this conviction that you had in November of 1957, were any promises made to you by any member of [fol. 332] the FBI or any member of the Government to induce you to make your plea of guilty?

Mr. Steinberg: I object to that, if your Honor please.
The Court: On what ground?
Mr. Steinberg: This is probably matter for cross-examination.
The Court: I will allow it.
Mr. Steinberg: Exception.
The Witness: Excuse me. What was that again?
Mr. Moran: Will you read the question back?
The Court: Were you given any promise by any mem-

ber of the Government at the time you pleaded guilty in September of '56?

The Witness: No. I haven't.

The Court: The question is were you?

The Witness: I was not.

The Court: Thank you.

Q. Were any promises given to you in relation to your plea of guilty to the two indictments now before this Court and jury?

A. No, there wasn't any.

[fol. 333] Q. What is your wife's name?

A. Dorothy Lillian Stracuzza.

Q. And what is her maiden name?

A. Maiden name? Dorothy Shaffler.

Q. Will you spell that?

A. S-c-h-a-f—S-c-h-a-e-f-l-e-r, S-c-h-a-e-f-l-e-r.

Q. And was she named as a defendant in the two indictments, along with these defendants now on trial?

A. Yes, she is.

Q. Do you have a brother?

A. Yes, Mario Stracuzza.

Q. And was he also named as a defendant in these two indictments?

A. Yes, he was.

Q. And did he plead guilty?

A. Yes, he did.

Q. Has he been sentenced?

A. No, he hasn't.

Q. That also pertains to the indictment that you pleaded guilty to in November of 1957; is that correct?

A. Yes, it is.

Q. He has not been sentenced on that?

A. No, he hasn't.

[fol. 334] Q. Has your wife been brought to trial on these two indictments, or the one in November 1957?

A. Yes, she has.

Q. She has been brought to trial?

A. In '57? Of conspiracy?

Q. Was she brought to trial?

A. No, she hasn't, no.

Q. She has not been convicted; is that correct?
A. No, she hasn't.
Q. Do you know the defendant Max Schaffer?
A. Yes, I do.
Q. Can you tell us whether he is in the courtroom today?
A. Yes, that is that gentleman.
Q. Would you point him out?
A. Right in the corner there.
Q. Will you tell us what he is wearing?
A. I believe it is a blue suit.

Mr. Moran: May the record indicate that the witness has identified the defendant Max Schaffer.

Q. Do you know the defendant Norman Schaffer?
A. Yes, I do.
Q. Can you tell us if you see him in the courtroom?
[fol. 335] A. That is the gentleman next to Max Schaffer, with the dark blue suit.

Mr. Moran: May the record indicate that the witness has identified defendant Norman Schaffer.

Q. Do you know Hyman Karp?
A. Yes, I do.
Q. Do you see him in the courtroom today?
A. It is the gentleman right next to you.
Q. Now, can you tell us when for the first time you met the defendants Max and Norman Schaffer?
A. The first time was in 1952, on 33rd Street and Seventh Avenue, in an office building that Sol Eisenberg and Hymie Berk operated.

Mr. Coleman: That is objected to, if your Honor please.
The Court: The question or the answer?
Mr. Coleman: Yes, and ask that the answer be stricken out.
The Court: Well, the objection to the question is too late. Do you move to strike out the answer?
Mr. Coleman: I move to strike the answer out.
The Court: I will deny it.
[fol. 336] Mr. Coleman: Exception.

Q. Now, when for the first time did you meet defendant Hyman Karp?

Mr. Steinberg: Just a second. I object to that question, if your Honor please.

The Court: I will allow it.

Mr. Steinberg: Exception.

A. When was the first time I met Hyman Karp?

Q. Right.

A. It was also on 33rd Street, in the office building that Sol Eisenberg and Hymie Berk operated, on 33rd Street.

Mr. Steinberg: Now, if your Honor please, he asked for when, and he got other material in the answer, and I ask that that be stricken.

The Court: Granted.

Q. Just answer the question if you can. When did you meet him, what period of the year?

A. In 1952, in April of 1952.

Q. Now, where did you meet the defendant?

Mr. Steinberg: Just a moment. I object to that as not within the scope of the indictment, because the indictment alleges later than that, if your Honor please.

[fol. 337] The Court: I will allow it.

Mr. Steinberg: Exception.

Q. Where did you meet the defendant Hyman Karp?

A. On 33rd Street, in an office building that Sol Eisenberg and Hyman Berk operated.

Q. Do you know the address?

A. I believe it was 53. I am not positive of it.

Q. 53 what?

A. West 33rd Street.

Q. Can you tell us when for the first time you met the defendant Benjamin T. Marco?

A. It was also on 33rd Street, in the office building that Sol Eisenberg and Hymie Berk operated in 1952.

Mr. Katz: Your Honor, we also wish to object to the question and ask that the answer be stricken from the record.

The Court: On the ground that it precedes the date in the indictment?

Mr. Katz: Yes, your Honor.

The Court: I will overrule it.

Q. What period of time was this that you met Marco? [fol. 338] A. It was around April of 1952.

Q. And do you see the defendant Benjamin T. Marco in the courtroom today?

A. Yes, that is this gentleman sitting right behind the desk, with the glasses on, dark suit,

Mr. Moran: May the record indicate that the witness has identified the defendant Benjamin T. Marco.

Q. Now, can you tell us the nature of your employment in April of 1952?

A. Well, I worked with Sol, Sol Eisenberg and Hymie Berk in changing tickets on dresses and delivering merchandise to their various customers in the garment area.

Mr. Steinberg: What was that first word, if your Honor please? Changing tickets on dresses?

The Witness: Yes, changing tickets on dresses.

Q. Can you be a little more specific as to what you did with the merchandise?

A. Well, would be packages coming up from the various drivers.

Mr. Steinberg: May I take a blanket objection to this entire line of testimony, if your Honor please, on behalf [fol. 339] of all defendants?

The Court: Yes.

A. (Continuing) I would have—these drivers and these fellows that dealt with Hymie Berk and Sol Eisenberg, would bring up merchandise and packages or loose dresses. If there were loose dresses, I would change the tags on them, put a different tag. I would put a style to identify the price, like if a dress was twelve seventy-five wholesale, I would put on the ticket "1275" and the size on the bottom, like if it was a size 14 or 12.

Q. Now, these dresses, were they in cartons or did they come in racks?

A. No, these were in cartons.

Q. What did you do with the merchandise, with the dresses, after you finished with them?

A. Well, I would deliver to his various customers in the garment area. If it was children's wear, well, then, I knew that was—the only customer I knew was Mr. Karp, of Fall River, Massachusetts. I would just put it in another box and reseal it and get it ready for the Railway Express.

Q. And did you deliver the merchandise to the Railway Express, or did they come and pick it up?

[fol. 340] A. Yes, they would come right to the building, around 4:30 and 5 o'clock.

Q. Now, how long were you with Berk and Eisenberg in this office on West 33rd Street?

A. Well, I was with them from April to about June of 1952.

Q. And what happened then?

A. Well, then they moved up to 110 West 40th Street, and I took charge of the office at 110—I mean, excuse me, at 33rd Street address, which they left.

Q. Now, during this period of time that Berk and Eisenberg were at the office on West 33rd Street, did there come a time when Max and Norman Schaffer came to the office?

A. Yes.

Q. Would you tell us what they did there, if anything?

Mr. Goldman: Objection, unless the time is fixed, your Honor.

The Court: Yes, you should fix the time, and I think you should fix each one separately, counsel.

Mr. Moran: All right.

Q. Can you tell us if during the period of April or May [fol. 341] of 1952 you saw Max Schaffer in the office of Berk and Eisenberg on West 33rd Street?

A. Yes, I saw him in the early part of April of 1952.

Q. You are talking about Max Schaffer now?

A. Max Schaffer, yes.

Q. And was merchandise shown to him at that time?

A. Yes. There is merchandise displayed on the rack,

or if there is any in the boxes, laying on the floor, he could see for himself.

Q. Did you or someone else show copies of invoices to him?

A. Well, that would be Sol Eisenberg's business.

Mr. Coleman: I object and ask that that be stricken out, your Honor.

The Court: Granted.

Q. Did you see him do it, is my question?

A. Yes, I did.

The Court: What did you see?

The Witness: Well, I would see Sol Eisenberg showing him the various merchandise that he has displayed in the office, and he can look to see if he wants it or not.

[fol. 342] Mr. Steinberg: If your Honor please—

The Court: I think the question was entirely different. The question was, did you see him show something else, other than the merchandise?

The Witness: Well, there would be invoices displayed, representing the packages that are there, or otherwise these dresses that we changed the tickets on, that we had from these packages that came from these various drivers, if I changed the tickets I would have them on the rack, rechanged, but we always kept some invoice in the office, Judge.

Mr. Steinberg: If your Honor please—

The Court: Yes.

Mr. Steinberg: I just want to note my objection to this, insofar as defendant Karp is concerned. I gather this is supposed to be conversation or some demonstration with Max Schaffer.

The Court: I don't think there is anything said about a conversation.

Mr. Steinberg: Or something shown to him, at any rate.

The Court: You object on the part of Mr. Karp?

Mr. Steinberg: No, I would like to have your Honor [fol. 343] rule that this is not admissible against Karp. This is a conversation—this is a demonstration to Max Schaffer.

The Court: He hasn't said a word about Mr. Karp.

Mr. Steinberg: I ask your Honor to instruct the jury that it has no relevancy to Karp.

The Court: Yes, at this moment it has no relevance; that is correct.

By the Court:

Q. But the question still remains as to whether or not you saw Mr. Eisenberg show something other than dresses to Mr. Schaffer?

A. Yes, yes, we have some of these invoices from these merchandise that came up from these various drivers, describing the contents of the merchandise that are displayed in the office.

Q. And you saw Mr. Eisenberg show such documents?

A. Yes, I did.

Q. To Mr. Schaffer?

A. Yes.

Q. Which Mr. Schaffer?

A. It would be Norman or Max Schaffer together there.

[fol. 344] Mr. Coleman: I object, your Honor. I didn't understand from the line of questioning that he was referring at this point to Mr. Norman Schaffer at all. I think the question that Mr. Moran was asking was first, when Mr. Max Schaffer came there, and that is when I asked that a time be fixed, and your Honor also said, "And who?" if I recall.

The Court: Yes, and the witness now said both.

Is that correct?

The Witness: Yes, they were both there.

By Mr. Moran:

Q. You are referring to the period of time of April or May 1952; is that correct?

Mr. Steinberg: He said early in April; he said early in April.

Mr. Moran: All right.

Q. Now, can you fix any other time or the number of occasions in which you saw either Max Schaffer or Norman

Schaffer in the office of Berk and Eisenberg on West 33rd Street?

A. Yes, they would come in about every ten, ten days, to every week in the office. I saw them a couple of times.

[fol. 345] Q. And did you on those occasions see any documents being shown to them by Eisenberg or Berk, or someone else?

Mr. Coleman: Now, your Honor, I object to that as being leading.

The Court: It is. Sustained.

Q. Well, tell us what, if anything, you saw happen in the office during that time?

A. Well—

Q. Relating to the two defendants, Max Schaffer and Norman Schaffer?

A. Yes. These drivers would bring up merchandise. I would have them changed, and these defendants, these gentlemens, Max and Norman Schaffer, wouldn't even be in the office yet. I would have these tickets changed, because I come in eight o'clock in the morning, and I would have these papers from the boxes prepared for Eisenberg, so he can do and sell to whom he wants to.

Mr. Coleman: I object to that and ask that it be stricken out. The question was in connection with their coming out, and he is answering but not responsively to the things that he would do in their absence.

[fol. 346] The Court: Sustained.

Q. I am asking you again to tell us anything that you observed in connection with the two defendants, not something that you did in their absence?

A. Well, the only thing I can observe is Sol Eisenberg showing them the dresses, if there's any coats and suits, and the invoice representing this merchandise that is displayed in the showroom.

Q. Now, did you see him do this on each and every occasion that they appeared in the office on West 33rd Street, in April and May of 1952?

A. Yes, I have seen him most of the occasions.

Q. Now, during that same period of time, April and May of 1952—

Mr. Steinberg: Just a minute. I object to the form of the question. He has testified to early in April, and now counsel is saying, "during the same period of time, April and May."

The Court: Sustained.

Q. During the early part of April and during the rest of April and May, did you see the defendant Hyman Karp on any occasion in the office of Berk and Eisenberg?

Mr. Steinberg: Object to the form of the question as [fol. 347] leading.

The Court: Sustained.

A. Yes, I have seen—

Mr. Steinberg: Just a minute. His Honor sustained the objection.

Q. All right, I will ask you, did you see Hyman Karp in the office of Berk and Eisenberg?

A. Yes, I did.

Mr. Steinberg: May a time be fixed, if your Honor please?

The Court: He has to do one thing at a time.

Now ask him the time.

Q. Did you see him there in—

The Court: No, ask him the time.

Q. Can you tell us the time that you saw him?

A. Yes, in about the third week of April he was, the same time I saw Max and Norman Schaffer was there, the same time when he was there. He was sitting down—I remember him sitting down, and they were looking at the coats and suits.

Q. Did you observe anything—what did you observe concerning Karp and anyone else in your office?

A. Well, I didn't know children wear on the day itself, [fol. 348] when Karp was there. I guess he was just there to speak to Sol Eisenberg and Berk. But I observed Norman and Max talking to Sol Eisenberg and looking at these invoices representing the merchandise in the office that are there then.

Q. Are you talking about the day when the Schaffers and Karp were in the office at the same time?

A. Yes.

Mr. Steinberg: Just a minute. I object to this, if your Honor please. He asked him about what he observed Karp do. He told us he was up there to look around. Now, then, he went off on a long harangue about the Schaffers, and now counsel continues that.

The Court: I will allow it.

Mr. Steinberg: Exception.

The Court: Your answer is "yes"? Did you say "yes"?

The Witness: Excuse me. I would like to have that—

Mr. Moran: May the question be read back?

(Question read.)

The Court: Is that the time you were talking about?

[fol. 349] The Witness: Yes, when I remember—

Mr. Steinberg: The answer is "yes," if your Honor please.

The Witness: (Continuing)—these three gentlemen—

Mr. Steinberg: Just a minute. I object to anything other than the answer to the question.

The Court: You have answered it. Thank you.

The Witness: (Continuing) Yes, they were in the office at the same time.

The Court: Thank you.

Q. Did there come a time after this that you saw Karp in the office of Berk and Eisenberg?

A. Well, I remember him on one other occasion. That was about the—about the last week, I believe, of May of 1952.

Q. And can you tell us what, if anything, you observed on that occasion?

A. Well, we had some children's wear already packed, I had packed in a box, going to Fall River, Massachusetts, and he was talking with Sol Eisenberg. I don't know what was their conversation, but I believe Berk showed him the [fol. 350] invoices describing this merchandise that are being shipped to him.

Q. Now, was that the last occasion that you saw Karp on 33rd Street?

A. Yes, that is the last one.

Q. Was there a time that you saw Benjamin T. Marco in the office of Berk and Eisenberg?

A. Yes, I saw him once.

Q. Can you fix a time for us?

A. Well, say, about the third week of April of 1952.

Q. And can you tell us what you observed, if anything, at that time?

A. Well, he picked out merchandise that was displayed there, and Sol Eisenberg showed him certain invoices describing this merchandise. I don't know what conversation they had among them, but I packed this merchandise and got it ready for the Railway Express Agency, going to Marco, to Bluefield, West Virginia.

Q. And can you tell us how this merchandise came into the office?

A. Well, he would have these various drivers and these men, I don't know whom they are, that brought loose merchandise, fifty, a hundred at a clip. I don't know where [fol. 351] they got them, but I recognized just packages, because I used to handle them myself.

Mr. Steinberg: If your Honor please, I ask that all this testimony of how it got there, not in the presence of the defendants be stricken.

The Court: I will allow it.

Mr. Steinberg: Exception.

Q. Now, did you meet any other customers, or were there other customers of Berk and Eisenberg?

A. Yes.

Q. On 33rd Street?

Mr. Steinberg: I will wait until he finishes.

Q. On 33rd Street?

A. Yes.

Mr. Steinberg: I object to questions about other customers, if your Honor please.

The Court: Well, the answer is "yes." It hasn't developed.

Mr. Steinberg: Would your Honor be good enough to caution the witness to give counsel a chance to object? Because once he answers, and your Honor has ruled it has been answered, I have a very difficult time making an objection, when he puts his answer right on top of a ques-
[fol. 352] tion without a chance to object.

The Court: Yes, if you see any of the lawyers rising to object, you withhold your answer until I pass on it.

The Witness: Yes.

Excuse me. What was that? May I have the question reread?

The Court: The question was whether you saw other customers. You said, "Yes."

The Witness: Yes. There—

The Court: No, that answers the question.

Q. Now, can you tell us his or her name, or their names?

Mr. Steinberg: Just a minute. I object to other customers, if your Honor please. I don't see the relevancy or necessity of it.

The Court: Are you going to tie the other customers in, in some way?

Mr. Moran: Yes, I am, your Honor.

Mr. Steinberg: That certainly doesn't seem to be ground for introducing evidence, the fact that he says he is going to tie it in. I object to it at this time.

The Court: The man is an officer of the court, and if
[fol. 353] he represents to me that he is going to tie it in in some way to the case, I will take it.

Mr. Steinberg: Will you take it subject to connection and subject to being stricken out if it is not tied in?

The Court: Of course, yes.

Who are these customers?

Is that the question?

Mr. Moran: Yes, it is, your Honor.

A. Yes, there was a Fred Kusnick, of Patty Ann Frocks, of 41st Street and Seventh Avenue, and also a Beatrice

Goldman, of a Mollie Zeitschner, of Washington, D. C., that came up there every week.

Q. Now, can you tell us what, if anything, you observed on the occasion or occasions when either of those persons came up?

A. Well, they would look at the merchandise, also, and he would show them the price of these merchandise from the invoices he had displayed, and if they wanted it, I would prepare it and ship it for them to these customers that ordered them.

Q. Now, I believe you have testified that Berk and Eisenberg were there two months, April and May of 1952?

[fol. 354] A. Yes.

Q. And that you remained in the office on West 33rd Street sometime thereafter; is that correct?

A. That's right.

Q. Can you tell us how long after Berk and Eisenberg left you remained on 33rd Street?

A. I remained there—they left—from June to, to the end of August.

Q. What year?

A. Of 1952. They moved to 110 West 40th Street.

Q. Were you associated with them in any way while they were on 110 West 40th Street?

A. Yes. I would—these drivers, he wouldn't want them to this new place that he moved to on 110 West 40th Street.

Mr. Steinberg: Who is "he," if your Honor please?

A. (Continuing) Sol Eisenberg wouldn't want these drivers to come up to 110 West 40th Street. So he told me I should take charge of the office, anything that came in I should get it and prepare it for them, change the tickets on the dresses; if anything came in children's wear, he don't want it up there, because he doesn't have no customers that came up to 110 West 40th Street for children's [fol. 355] wear. So he says just leave it in a box. If it's a clean box, just retape it; if it's an old box, put in a new box and give the Railway Express.

Mr. Steinberg: If your Honor please, I ask that this entire conversation with Mr. Eisenberg be stricken out.

The Court: I don't recall him testifying to a conversation.

Mr. Steinberg: He is just talking about relations between him and Eisenberg, and conduct and method of operations described by Eisenberg, as I understood.

The Court: Yes, but you said it's a conversation.

Mr. Steinberg: Well, this entire answer, I ask that it be stricken out.

The Court: I will allow it.

Mr. Steinberg: Exception.

Q. Now getting back to the time that Berk and Eisenberg were on 33rd Street with you, that is, April and May of 1952, did they pay you a salary, or what compensation did you receive?

A. They gave me $35 a week.

[fol. 356] Q. That was for April and May of 1952?

A. That is correct.

Q. Now after they moved to 110 West 40th Street in June of 1952 and you continued to operate the office on West 33rd Street until the end of August 1952, did you receive any payment from them?

A. Well, the merchandise—I supposed to get 10 per cent of what these drivers would bring up to me. The valuation of the merchandise they would bring up to me, I was supposed to get 10 per cent from Sol Eisenberg.

Q. Did you make any payments to the drivers for the merchandise?

Mr. Steinberg: Just a minute. I object to all this line of questioning, if your Honor please, as not within the scope of the indictment.

The Court: I will allow it.

Mr. Steinberg: Exception.

A. Did I make any payments to them?

Q. Yes, did you actually pay the drivers?

A. Yes, I did.

Q. What did you pay them?

A. I paid them 45 per cent of the total invoice of the merchandise from these packages.

Q. Did you pay them in cash?

[fol. 357] A. Yes, I did.

Q. Now, you say you got 10 per cent; what did that 10 per cent—

The Court: He said he was supposed to get 10 per cent.

Q. Did you actually get 10 per cent?

A. Well, he was giving me at the beginning in this times. There are times he took it away.

Mr. Coleman: I object. It is not responsive. He can answer that yes or no.

The Court: Yes, did you or did you not get the 10 per cent?

The Witness: Yes, I did.

Q. What did this 10 per cent represent?

A. Well, if a truckman brought a package, say a hundred dollars, and I look at the manufacturer's invoice, and I would give him 45 per cent of it. I would take that same package and reclean it and give it to Sol Eisenberg. He would give me 10 per cent. I would make ten dollars on this here package, the difference between the forty-five per cent and the 55 per cent.

Q. What, if anything, did Berk or Eisenberg get for this?

[fol. 358] A. Well, whatever—

Mr. Steinberg: Just a second. I object to that question.

The Court: I will allow it.

Mr. Steinberg: Exception.

A. Whatever they charge. I wouldn't know. They could charge any amount above 55 per cent. I wouldn't know how much they charge his accounts. He never confided with me on that.

Q. But you got 55 per cent from them; isn't that correct?

A. That is correct.

Q. Of which you had to pay 45 per cent of the invoice price to the driver.

A. That is right.

Q. Can you tell us what, if anything, you did with this merchandise when you received it in the office on West

33rd Street during the period of time that you were there by yourself?

A. Well, I would get the dresses—if I seen dresses or coats, I would put them on hangers, put them on a rack, look at the invoices from these manufacturers, and if a coat, for instance, says "thirty-two seventy-five," I put a [fol. 359] new white ticket on the coat and put "3275" and a size on it. If it's a 12 or 10, I put a 10, and I would do it all the way on. Say if he had twenty-four pieces, I would do it on the twenty-four pieces. I would take these bills, call up Sol Eisenberg and tell him I am coming.

Mr. Coleman: I object to a conversation, your Honor, that he is testifying about with Sol Eisenberg. The defendants were not present.

The Court: That is true, Counsellor.

Mr. Moran: All right.

Q. Just tell us what you did, not any conversation that you had.

A. Well, I would change the tickets on all these dresses, take the manufacturer's tickets off, put a little white ticket on, and like I said, if a dress or a coat has a price range of fourteen seventy-five, I would put on a white ticket, "1475," make a line, put the size under it, and do it with every garment that I had in dresses, coats or suits. If there was any children's wear, I would leave it intact, because he only had one customer that I knew of. That was Hyman Karp, of Fall River, Massachusetts. I would leave that in the office.

Q. You are speaking about children's wear?

[fol. 360] A. Yes.

Q. Now, after you had written up these tags on the merchandise, what did you do, if anything, with the merchandise?

A. Well, I put them in a couple of little salesmen bag that Sol Eisenberg left for me, and I would take a cab and bring it up to his premises at 110 West 40th Street.

Q. That was all the merchandise that you received?

A. Yes.

Q. Did you leave it there?

A. Yes. I would show it to him and—

Mr. Coleman: He has answered that, your Honor. He has answered the question. The question was, "Would you leave it there?" and the answer was "Yes."

The Witness: Yes, I would leave it there.

Q. Did there come a time on any occasion where you would take the merchandise to a shipping or a freight station?

A. Yes. There was times I had stuff—

Mr. Steinberg: If your Honor please, it is very difficult to conduct this trial if he is going to volunteer something. [fol. 361] The answer is "Yes." He should stop and then wait for the next question. I object to anything further.

The Court: Sustained.

Q. Could you tell us when and what occasions you took merchandise to various shipping agencies?

A. I had some coats, I had merchandise, I had coats, dresses and suits, I would have a clean box to put these in, to ship to, say, Schaffers, of Lebanon, Pennsylvania, and I would take a cab with it and take it to U. S. Packing on 38th Street and Eighth Avenue.

Mr. Coleman: First of all, your Honor, I object. Mr. Moran said, "Did there come a time when?" I think we are entitled to know the time he is now speaking of.

The Court: Yes, tell us the time.

Q. When did this occasion or occasions occur?

A. This was when I was with Sol Eisenberg and Hymie Berk on 33rd Street, in April and May of 1952.

Q. Did you do the same thing with this merchandise during the summer of '52?

A. In the summer of—

Mr. Coleman: Your Honor, I object and ask that that be stricken out.

The Court: Sustained.

[fol. 362] A. (Continuing) In the summer of—

The Court: Wait a minute.

Mr. Coleman: Wait a minute, please.

The Court: I will take over, Counsel.

You will ask the question again.

(To the witness.) Just be responsive, if you will.

Q. I think I asked the question, did there come a time after April and May when you took merchandise to various shipping agencies?

Mr. Steinberg: And the answer is yes or no, if your Honor please.

The Court: Now, Counsellor, you just can't be interfering that way.

Mr. Steinberg: I am sorry, sir. I am sorry. Because he has volunteered so much—

The Court: No, there must be a reason that prompts you. You are not allowed to do it. It you have an objection, you will have to rise like a lawyer and make it.

Mr. Steinberg: I respectfully object to his giving anything other than a yes or no answer.

The Court: All right.

Did you do the same thing after April and May?

[fol. 363] The Witness: Well—

The Court: Yes or no?

The Witness: In delivering packages?

The Court: Taking them to some shipping companies for delivery by them?

The Witness: No, after that it was only—

The Court: The answer is no, you did not.

The Witness: No, I didn't.

The Court: Thank you.

Q. Will you tell us what you did after April and May with this merchandise?

Mr. Coleman: Objected to unless he is fixing a time when after April or May?

A. From June—

Q. During the period you were there—

A. —to August.

Q. May I finish my question, please?—during the period you were there, on 33rd Street, by yourself, after Berk and Eisenberg moved to 110 West 40th Street, until the time you left, yourself, in the end of August 1952, and that is the period of time?

A. Yes. Well, all I did then was nothing but in changing these tags on these coats, suits and dresses, and just bring-
[fol. 364] ing them up to Sol Eisenberg, at 110 West 40th Street. That is all I did from June to the end of August.

Q. Now, during the period of time that you were there, on 33rd Street, by yourself, from sometime in June 1952 to the end of August 1952, did there come a time during that period that you were associated with your brother, Mario Stracuzza?

A. Yes. He came in the last two weeks.

Mr. Steinberg: May I object to anything other than "yes," if your Honor please.

The Court: You have answered the question when you said "yes."

Q. What period of time, if any, were you associated with him?

A. In the last two weeks of August.

Q. Can you tell us what he did, if anything?

A. Well—

Mr. Steinberg: Just a minute. I object to the form of the question.

The Court: I will allow it.

Mr. Steinberg: Exception.

A. He gave me a hand to prepare this merchandise to take to Sol Eisenberg, to 110 West 40th Street.

[fol. 365] Q. Now, did there come a time when you closed the office there on West 33rd Street?

A. Yes, there was.

Q. When was that?

A. At the end of August of 1952.

Q. What happened thereafter?

A. Well, Berk told me to open up a different place, so I—

Q. Where?

A. At 1133 Broadway is where I did open up another place.

Q. When did you open?

A. In 1952.

Q. What period of time?
A. September of 1952.
Q. Did you have a bank account?
A. Yes, sir.
Q. For this business?
A. Yes, sir, I did.
Q. Under what name?
A. Charles Santangelo.
Q. At what bank?
A. Federation Bank & Trust Company, on 34th Street and Eighth Avenue.
[fol. 366] Q. Did you use your own name at this new location, 1133 Broadway?
A. No, I didn't.
Q. What name did you use?
A. I used A. Finkel, F-i-n-k-e-l.
Q. Can you describe the office that you had?
A. Well, it was a, say, a 8 x 15 showroom.
Q. Just one room?
A. Yes, just one room.
Q. How long did you remain in this office, this location, 1133 Broadway?
A. I remained from September to March, September of 1952 to March of 1953.
Q. Was there anyone else associated with you in that business under the name of A. Finkel?
A. Yes, a Hymie Berk.
Q. Was your brother Mario Stracuzza associated with you?
A. Yes, he was.
Q. Was Sol Eisenberg associated with you?
A. No, he wasn't.
Q. Now, will you describe how you conducted your business there under the name of A. Finkel, at 1133 Broadway, [fol. 367] from September 1952 until sometime in March 1953?

Mr. Steinberg: I object to that question, if your Honor please, as not within the scope of the indictment.
The Court: I will allow it.
Mr. Steinberg: Exception.
Mr. Coleman: I further object, your Honor, on the

ground that it is too vague. "How did you conduct your business?" That would cover a multitude of things.

The Court: Well, we will listen, and you may have an exception.

A. Well, we had drivers that would come downstairs, would call us, that would meet us downstairs, and my brother had these various drivers in the garment area that he would meet in designated places, or that he would make arrangements with them. He would bring them to me, and in turn I would get these merchandise and put them on a rack, and leave them in the boxes, and Berk would dispose of it the way he would want to.

Q. Well, would you do anything with the merchandise when you received it from the drivers?

A. Yes. They gave it to me; I would pay them, say, for instance a package $300, if I paid him 45 per cent, [fol. 368] I would get 55 per cent off Hymie Berk. I would make a 10 per cent difference.

Q. Would you keep that 10 per cent for yourself?

A. Well, it would be 5 per cent for me and 5 per cent for my brother.

Q. Did you remain in the office, or did you go out in the street?

A. No, I remained most of the time in the office. Occasionally I went downstairs. If my brother called me and told me a certain driver was coming over, I told him I will go down and I will pick it up for him.

Q. What did you do with the merchandise after you had examined it in the office?

A. Well, Berk would prepare most of this. If there was coats, suits and dresses, he would give most of it to Schaffers of Lebanon, Pennsylvania. If it was children's wear, well, I would put them in another box. If the box was damaged, I would put them in a new box. If it was, just, say, not too much writing on it, I would retape it and get it prepared for Hyman Karp, of Fall River, Massachusetts.

Q. Now, during this period of time, from September 1952 until March 1953, did there come a time when either Max Schaffer or Norman Schaffer came to the office at [fol. 369] 1133 Broadway?

A. Yes, there was.

Q. Can you tell us the number of occasions when they came?

A. They would come about every week to every ten days.

Q. Would they come together or individually?

A. Most time together.

Q. Were there times during this period that Max Schaffer would come alone?

A. Yes, there was.

Q. And were there times when Norman Schaffer would come alone?

A. Yes, there was.

Q. Will you tell us what, if anything, they did while they were in the office?

A. Well, they would look at the merchandise that is displayed on hand there, and Berk would show the invoices describing this merchandise. If they wanted it, it would go right out. I would pack it for them and have it ready for U. S. Packing, on 38th Street.

Q. When you say, "the invoices," you mean the manufacturers'?

A. The manufacturers', yes.

[fol. 370] Q. Now, did there come a time during this period from September 1952 until March 1953 when you were operating under the name of A. Finkel, that Hyman Karp came to the office on one or more occasions?

A. Yes, he did.

Q. Can you tell us the number of occasions that Hyman Karp came there?

A. I'd say about three or four times.

Q. Can you tell us what, if anything, he did when he was in the office?

A. Well, at one occasion I remember I had a lot of children's blouses he had seen on the premises itself, and whatever was packed, Berk would show him the invoice representing—from the manufacturers, he can see for himself what he is getting. But all children's wear went to him.

Q. And this happened on each and every occasion that he came?

A. That is correct.

Q. Were you paid a salary, or what compensation did you receive from Berk?

A. I am supposed to get 55 per cent of everything in ladies' wear and 50 per cent of children's wear.

Q. And from this you had to pay the drivers their 45 [fol. 371] per cent?

Mr. Coleman: I object to that as leading, if your Honor please.

The Court: Yes, don't lead the witness, Counsel.

Q. Did you or someone else have any invoices of your own?

Mr. Coleman: I object to the double form of that question, if your Honor please?

The Court: Sustained.

Q. Did you prepare invoices for the shipments of your merchandise?

A. No, Hymie Berk prepared all the invoices at 26th Street and Broadway.

Q. Can you describe these invoices to us?

A. Yes. They had "A. Finkel" written on it, and "1133 Broadway," and our telephone number.

Q. W[illegible]e they typewritten or printed or what?

A. These were printed.

Q. And when he, when Berk prepared the invoices, were they typewritten or handwritten or what?

A. These were—they were handwritten.

Q. You never prepared any invoices; is that correct? [fol. 372] A. No, I did not.

Q. Now, did there come a time while you were on 26th Street that the Schaffers and Karp were there at the same time?

The Court: Excuse me, Counsel. I don't remember 26th Street.

Mr. Moran: Twenty-sixth Street is 1133 Broadway, your Honor.

The Court: All right, that is news to me. All right.

Q. Will you tell us where 1133 Broadway is?

A. 1133 Broadway is 26th Street and Broadway. It is the corner building.

Q. Did there come a time at that address, during the period of time that you were there, that either Max Schaffer or Norman Schaffer came to the office at the same time Hyman Karp was there?

A. Well, I don't remember them being together there, but it is possible they were.

Mr. Coleman: Well, your Honor, he has answered that.

The Court: Thank you. That was just an observation.

Mr. Coleman: I object to part of the conjecture.

[fol. 373] Mr. Steinberg: I object to it, too, if your Honor please.

The Court: Sustained.

Counsel, you can't group defendants together. These men are charged separately with crimes, and you will have the burden of proving the crime against each one separately. Merely because they are related doesn't mean anything.

Q. Do I understand then that the answer you have given relates both to Max Schaffer and to Norman Schaffer?

A. Yes.

Q. That you did not see them with Hyman Karp at any time on 26th Street?

A. No, I didn't.

Q. Now, how did your customers pay for the merchandise that they received?

A. By check.

Q. And how were these checks made out?

A. To A. Finkel, 1133 Broadway.

Q. How did you receive these checks?

A. By mail.

Q. Did you receive them directly?

[fol. 374] A. Well, the Schaffers came directly, and Hyman Karp's went to Hymie Berk's address.

Q. And did you ever see them or receive them?

A. Well, Berk would in turn bring them to me and try to straighten out whatever he owes me.

Q. What did you do with the checks payable to A. Finkel that you received from Schaffers?

A. I would deposit them in the account of Charles Santangelo at the Federation Bank & Trust Company.

Q. Did you endorse the name "A. Finkel" on them?

A. Yes, I did.

Q. And also counterendorsed them under the name of Charles Santangelo?

A. I did.

Mr. Moran: May I have these marked Nos. 1 through 51?

(Marked Government's Exhibits 1 through 51 inclusive, for identification.)

The Court: We will take a short recess.

(Short recess.)

ANTHONY STRACUZZA resumed.

Mr. Moran: May I have the last question and answer read?

[fol. 375] (Question and answer read.)

Direct examination (continued).

By Mr. Moran:

Q. Mr. Stracuzza, I show you Government's Exhibit 1 for identification, to Government's Exhibit 51 for identification, and ask you if you can identify those documents?

A. Yes.

Q. Can you tell us what they are?

A. These are photostatic copy of checks that Hyman Karp had sent to A. Finkel.

Q. Now, I direct your attention, pointing to Government's Exhibit 1 for identification, to the back of that check, and ask you if the first name that appears there is in your handwriting?

A. Yes, it is.

Mr. Steinberg: If your Honor please, let him be good enough to identify the exhibit by exhibit number.

The Court: I think he said Exhibit No. 1.
Mr. Steinberg: I am sorry, sir.

Q. Is that your signature, the first signature that appears in Government Exhibit 1 for identification?
A. Yes, it is.
Q. Now I ask you to look at each of the fifty-one ex-
[fol. 376] hibits, number 1 through 51, and tell us whether the signature, the first signature that appears there, is in your handwriting?
A. Yes.
Q. Now having looked at the entire fifty-one documents, can you tell us whether the first signature that appears on the back of each one of these checks is in your handwriting?
A. Yes, they are.
Q. And that each one of these checks was received from Hyman Karp, payable to A. Finkel; is that correct?
A. That's right.

Mr. Coleman: Would your Honor ask the witness to speak just the least bit louder?
The Court: Could you keep your voice up for each answer?
The Witness: Yes.
Mr. Coleman: Thank you very much.

Q. Now, can you tell us whether you deposited these checks in the name of Charles Santangelo, each and every check?
A. Yes, I did.
Q. Each and every check you deposited?
[fol. 377] A. There is some that I would discount in my wife's bank account, and some I would give to my sister-in-law, Marie, to deposit—have her discount them in a super market.
Q. What do you mean by "discount"?
A. Try to get cash right away, so I could have money on hand to buy more merchandise.
Q. Your wife cash the check for you, in other words?
A. Well, discounted in her bank and draw out cash in

place of that, and some checks I would give to Marie Stracuzza.

Q. That was your sister-in-law?

A. Yes.

Q. And she would cash them for you?

A. Yes, she would cash them in a super market for me.

The Court: Then the answer is, "No, I did not deposit them all in the account of Santangelo"; is that correct?

The Witness: That is correct.

Q. You say that you stayed at 1133 Broadway, 26th and Broadway, until March of 1953; is that correct?

A. That is correct.

[fol. 378] Q. Now, can you tell us your arrangements with Berk concerning all this merchandise?

A. Well, my arrangements with him is, I was supposed to be getting 10 per cent, and I was not getting all the way 10 per cent. There is times like on two occasions, like on Hyman Karp, there is two bill numbers he claimed that Hyman Karp didn't get, totaling maybe around $700 that I got beaten out of. So I didn't say nothing of that until he showed me another one of—in the midtown area, of another customer—I believe it was Excellent Value, the name of this customer—totaling about $480. So I started argue with him, and I told him, "Look, I don't want to do no more business with you. I want to close the place up." And that is what I did.

Q. So there came a time in March 1953 that you did close; is that correct?

A. That's right.

Q. Can you tell us, concerning the merchandise that you sold to Karp, how much—what was the price that he paid?

A. Oh; I was supposed to get 50 per cent. Anything over that, Hymie Berk got more, over 50 per cent.

[fol. 379] Q. And how much did you pay for this merchandise to the drivers?

A. Well, I paid from a third to 45 per cent of the manufacturer's invoice.

Q. Now, did there come a time that you closed the business—you say you closed the business in March of '53;

did there come a time when you moved to another location?

A. Yes, I moved at 48 West 25th Street.

Q. And when did you start there?

A. I started in May of 1953.

Q. And how long did you continue there?

A. Until, until about the 28th of July, of 1953.

Q. And were you associated with anyone at this new place?

A. Just my brother and I.

Q. Mario Stracuzza?

A. That's right.

Q. Did you operate this place of business under your own name?

A. No, I had a name under A. Shaffler.

Q. And did you have invoices covering your merchandise?

A. Yes, I did. I had went to a printing store and bought [fol. 380] the same sheets I did with Finkel, same store that made invoices under A. Shaffler.

Q. And did you have a bank account?

A. Yes, I did.

Q. Under what name?

A. Charles Santangelo.

Q. Was it the same bank account that you used for the other location on 26th Street?

A. Yes, I did.

Q. When you sold any merchandise to any customer, did you send a copy of one of your invoices, under the name of A. Shaffler, to them?

Mr. Steinberg: Object to this blanket question, if your Honor please.

The Court: Sustained.

Q. Did you make any sales of merchandise to the defendant Max Schaffer, under the name of A. Shaffler?

A. Yes, I did.

Q. Did you make any sales of merchandise to the defendant Norman Schaffer under the name of A. Shaffler?

A. Yes, I did.

Q. Did you send to Max Schaffer a copy of your in-

voice under the name of A. Shaffler, for the merchandise that you sold him?

[fol. 381] A. I did.

Q. And did you send to Norman Schaffer—

A. I did.

Q. —copies of your invoices under the name of A. Shaffler, for merchandise that you sold to Norman Schaffer?

A. That is correct.

Q. Did you sell merchandise, operating under the name of A. Shaffler, to Hyman Karp?

A. I did.

Mr. Steinberg: May we have a time fixed, if your Honor please?

Just a second.

The Court: The answer is "yes." Now fix the time.

Q. Can you tell us when you first started to sell merchandise to Hyman Karp?

A. In May of 1953.

Q. Can you tell us any particular part of the month that you started?

A. Say, say about the middle of May.

Q. Until what period of time?

A. Until, until, up to about July 28th.

Q. And during this time that you were dealing with [fol. 382] Karp, did you send invoices to him under the name of A. Shaffler?

A. I did.

Q. On each and every occasion?

A. Yes, I did.

Q. And when did you first start to do business with Max Schaffer?

A. In the—

Mr. Coleman: Your Honor, I think it would be repetitious. I think Mr. Moran meant something else, because he just asked that question.

The Court: Didn't you cover that?

Mr. Moran: All right. I don't know that I fixed an exact time.

Mr. Coleman: I thought you had, in May of '53, middle of May.

Mr. Moran: All right.

Q. Can you tell us whether you did any business with Benjamin T. Marco while you were operating under the name of A. Shaffler?

A. Yes, I did.

Q. Can you tell us when you began business with him?

A. I began in June of 1953, as a result of a conversa- [fol. 383] tion I had with a Patty Ann Frocks, on 41st Street and Seventh Avenue. After speaking to Fred Kusnick, of Patty Ann Frocks, I called up Benjamin Marco and I told him, "You remember me?" I said, "I worked for Sol Eisenberg on 33rd Street?"

He said, "Yes, I do."

I said, "Well, I was with Hymie Berk on 26th Street. Now I am trying for myself." I says, "Would you like to buy from me?"

He says, "What do you handle?"

I said, "I handle everything from dresses, coats and suits—anything you want."

So I asked him what did he want?

He says, "I want nice merchandise, better dresses."

I says, "I'll get that."

He said, "All right, you can start sending."

I started shipping immediately.

Mr. Coleman: At this point, if your Honor please, I would like to note an objection, that this testimony is not applicable at this point to Max Schaffer or the defendant Norman Schaffer, this conversation that he just related.

The Court: The jury heard him say that he talked with [fol. 384] Mr. Marco.

Mr. Coleman: That is right, your Honor. A conversation between this witness and Mr. Marco at this point would not be chargeable to the defendants Schaffer.

The Court: Of course not.

Mr. Steinberg: May I also ask your Honor to instruct the jury that any conversations not in the presence of any of the defendants are not applicable to them.

The Court: No, I can't be that broad, because it might tie in later on if conspiracy is proved.

Mr. Steinberg: Yes, but at this point it hasn't been

proved, and at this point it is not admissible. Will your Honor so instruct them?

The Court: At this point it is admissible, but it doesn't apply to the people not named, until the Government proves the conspiracy.

Mr. Steinberg: Unless your Honor rules it is a prima facie case.

The Court: That is correct.

Mr. Steinberg: Thank you.

By Mr. Moran:

Q. Now, during the time that you did business with [fol. 385] Benjamin T. Marco, did you send him an invoice for each and every shipment that you made to him, under the name of A. Shaffler?

A. Yes, I did.

Q. From whom did you purchase this merchandise that you sold to Max Schaffer?

A. From the drivers in the garment area. I had my brother pick them up. I would take care of the office. He would go to these various drivers that used to get overs and packages from certain depots, and such, and would bring them to me.

Mr. Coleman: Now, your Honor, I ask that this latter portion be stricken out. The question is, "From whom did you make a purchase of merchandise that you sold to Max Schaffer?"

The Court: That's right; and he said, "From various drivers."

The Witness: That is correct.

Mr. Coleman: I move that that is answered.

Q. And from where or from whom did you obtain the merchandise that you shipped to Norman Schaffer?

A. Also from these various drivers that gave my brother—

Mr. Coleman: Now, your Honor, I object to that unless [fol. 386] he knows of his own knowledge. What someone else might have told him would not be admissible.

The Court: That's right.

Q. From whom, if you know, did you obtain the merchandise that you sent to Benjamin T. Marco?

A. Oh, well, we had these, these few drivers that were—

Mr. Katz: Your Honor, I object to the form of the question and what proposes to be an answer. "We had," I submit, is improper.

The Court: I don't understand your objection to the question also, sir.

Mr. Katz: He said, "we," your Honor, as I understand it. I don't know whom he is referring to.

The Court: Then you don't object to the question. The answer is what you object to.

Mr. Katz: Yes.

The Court: Sustained.

Q. Just tell us what you did, and if you know, just tell us how you obtained the merchandise that you sent to Benjamin T. Marco?

A. Well, my brother knew various drivers in the gar- [fol. 387] ment area that gave him packages.

Mr. Katz: We object, your Honor. We object to what his brother did, or anything relating to his brother when he was not there. It is obvious he wasn't.

The Court: It is obvious he wasn't what?

Mr. Katz: I mean that he wasn't present, from what he has just said. He said his brother—

The Court: Is it a fact that all of the merchandise you sold to all of these defendants were purchased from these drivers in the garment district?

The Witness: Yes, that my brother took care of that side of the garment—there is some truckmen that came to the premises of 48 West 25th Street, which I was running by myself, that I paid personally to.

The Court: And the others were by your brother?

The Witness: That is correct.

Mr. Steinberg: Now, if your Honor please, I object to that portion of your Honor's question, and to the answer which deals with transactions by his brother, not in his knowledge or his presence.

The Court: I'll allow it.

[fol. 388] Mr. Steinberg: Exception.

Q. And did your brother bring to your office all of the merchandise that he obtained from the drivers?

Mr. Steinberg: Just a minute. I object to it.

The Court: I will allow it.

Mr. Steinberg: Your Honor, it calls for hearsay. It is a double-barreled question. He said all the merchandise he obtained from the drivers he bought, but I think the form is objectionable.

The Court: I will allow it.

Mr. Steinberg: Exception.

A. Whatever merchandise he obtained from these various drivers in the garment area, and whatever I picked up from the drivers that called me up, I could handle personally what driver came to my premises, but I don't know the drivers that he picked up from. But any packages that he gave me, I took care of, like coats, suits and dresses, I only had Schaffers and Marco.

Mr. Coleman: I object to that latter portion, your Honor. It is not responsive.

The Court: Sustained.

Q. The question is, did your brother, Mario Stracuzza, [fol. 389] give you each and every package that he got from the drivers, and bring it to the office?

A. Yes, he did.

Mr. Steinberg: I object.

Please, his Honor instructed you before to wait.

If your Honor please, I object to the form of the question.

The Court: I will allow it.

Mr. Steinberg: Exception.

A. Yes, whatever packages my brother picked up in the garment area, he brought to me.

Q. By what means were these packages purchased, by check, cash, or whatever means?

A. We always paid cash.

Mr. Coleman: I object to that.. That is leading this witness.

The Court: Overruled.

Q. How did your brother get this cash?

Mr. Steinberg: Object to that as calling for hearsay.

The Court: I will allow it.

Mr. Steinberg: Exception.

A. Excuse me?

[fol. 389a] The Court: How did your brother get this cash?

A. Well, I would draw it from the Charles Santangelo bank and give it to him so he can purchase this merchandise.

Q. Can you tell us how much Max Schaffer paid for the merchandise that you sent him?

A. Sixty-five per cent.

Q. Of the manufacturer's invoice price?

A. That is correct.

Q. Can you tell us how much Norman Schaffer paid for the merchandise that was sent to him?

A. Same thing, sixty-five.

Mr. Coleman: Object to that, if your Honor please.

Do I understand from the question that we are now at 48 West 25th Street, Mr. Moran?

Mr. Moran: We are talking about 48 West 25th Street.

Mr. Coleman: I understand. All right.

The Court: You withdraw the objection?

Mr. Coleman: Yes, I didn't know at what point we were, your Honor.

The Court: All right.

[fol. 390] A. Sixty-five per cent, also.

Q. Can you tell us how much Hyman Karp paid for the merchandise that you sent to him?

A. Well, Karp—I called him up, and I told him I wanted 60 per cent.

He says, "I wouldn't pay less than 50," because he was thinking of 26 again.

I told him, "Either you give me 55 or I won't sell you."

We finally agreed with 55 per cent, and that is when I sold it to him.

Q. When did you have this conversation that you just alluded to?

A. Well, right at the beginning of May, in the middle of May, when I first did business. I called him on the phone and I told him.

Q. Did you identify yourself?

A. Yes, I told him, I says, "Karp, this is Tony." I said, "Look"--

The Court: You said what?

The Witness: I said, "This is Tony."

The Court: What did you say before that?

The Witness: "Karp."

The Court: "Karp"?

[fol. 391] The Witness: Calling him.

The Court: Yes.

A. (Continuing) I said, "Karp, this is Tony." I said, "Look, I don't want no aggravation like I had on 26th Street, beating me on two previous occasions on bill numbers that Berk claimed, which totaled about $700." I says, "I will do business with you on the condition you don't give me any aggravation."

He said, "Don't worry about it." He said "You can start shipping." And that is what I did.

Q. How would you send this merchandise to Max Schaffer?

A. Well, by U. S. Packing, on 38th Street.

Q. Did you deliver the merchandise?

A. My brother. We had a ten-and-a-half truck that we delivered this merchandise to the packing house.

Q. Did you use the same method of transportation, as far as Norman Schaffer is concerned?

A. Yes, sir.

Q. And how did you ship the merchandise that you sold to Hyman Karp?

A. Railway Express.

Q. Did you deliver to Railway Express office, or did someone come to you?

[fol. 392] A. No, down in the street the truck is always parked, they stay there until about 6:30, 7 o'clock; or I have his prepared last, I bring it myself to the Railway Express downstairs. I put it on a flat and push it in the elevator and get signed for it off the truckman downstairs, that is, the Railway Express.

Q. And how did you ship the merchandise that you sold to Benjamin T. Marco?

A. Also by Railway Express.

Q. What price did you sell the merchandise to Benjamin T. Marco for?

A. Oh, Benjamin—60 per cent.

Q. At the manufacturer's price?

A. Yes, sir.

Q. Did you ship the merchandise in cartons?

A. Yes. If the carton was clean, I can retape it and write over it. If it was—if it was a damaged box, I would just scribble out, break it up, and just fold them—I would have a whole stack of them, and just tie it and threw them in the hallway.

Q. How long did you keep the merchandise after you received it in the office?

A. Well, it always went out the same day.

Q. Always went out the same day?

[fol. 393] A. Yes, sir.

Q. Did Max Schaffer make a specific order for merchandise?

A. Well, he preferred coats, suits and dresses.

Q. Did he visit your office while you were at 25th Street, from May through June and July of 1953?

A. Yes, he did.

Q. How often?

A. He would come about every week to every ten days.

Q. And did Norman Schaffer come to your office during that period of time?

A. Yes, sir.

Q. How often?

A. Same thing.

Q. Every week or ten days?

A. They would come in on—yes, most times they would be together.

Q. And did that continue right up until the 28th of July?

A. That is correct.

Q. Can you tell us the circumstances of how you first did business with Max Schaffer on 25th Street?

A. Well, Schaffer, I called him up on the phone and I [fol. 394] told him that I—

Mr. Coleman: Your Honor, at this point I would like the witness to fix the time of this.

The Court: Yes.

The Witness: It was in May of 1953.

Q. Can you fix the date at sometime in May?

A. Well, could be somewheres about, say, the middle of May, also. I was starting the same, like these other accounts.

Q. You had a telephone conversation with Max Schaffer?

A. Yes, sir.

Q. Can you tell us what you said to him and what he said to you?

A. Well, I told him that I opened up an office for myself; I had a lot of aggravation with Berk, and I would like to do business with him.

He said he will be in about a week.

So I went to 110 West 40th Street—

Q. That is Berk's office?

A. Yes, that is Sol Eisenberg and Berk's office, at 110 West 40th Street, and I saw him up there, and—

Mr. Coleman: Your Honor, first we have only a telephone conversation. Now he is going into something else. [fol. 395] I understood Mr. Moran asked him what was the telephone conversation?

The Court: Yes.

Mr. Coleman: I object to anything further than conversation at this point.

The Court: Sustained.

Q. Did there come a time when you had a further conversation with Mr. Max Schaffer?

A. Yes.

Q. When?

A. A week later, after I called him.

Q. Where?

A. At 110 West 40th Street. I waited until he came downstairs from Sol Eisenberg's office, which I went into and I spoke to him there. I didn't want to speak there, because I didn't want to see Solly seeing that—Eisenberg knowing that I am speaking to any of his accounts, which I am trying to take away from him. So I waited until he came downstairs, and I says, I says, "Max," I said, "look, I am in business for myself."

Mr. Coleman: I can't hear the witness. Would you speak louder, please?

The Court: Keep your voice up, please.

[fol. 396] A. (Continuing) I said, "Max, I am going in for myself"—Norman was with him—I says, "I'd like that you buy from me." I said, "I had a lot of aggravation with Berk," I says, "and he give me the business in the money part of it. If you like to do business with me, I can give you the same merchandise that he can give you, and maybe better, because we are getting merchandise that just came out from the manufacturers."

Q. And what did Max Schaffer say, if anything, to you?

A. "Well," he said, "give me your telephone number and I will call you when I come back." And he did call me, and I told him to come up—a week later he called me. I told him to come up. He came up and he looked at the merchandise and he liked it, and I prepared the form.

Q. Now, this time that he came up to your office, it was a week later after you had this conversation; is that correct?

A. That's right.

Q. Was Norman Schaffer with him at that time?

A. Yes, sir.

Q. And Norman Schaffer was present at the earlier [fol. 397] conversation, outside of Berk's office; is that correct?

A. That's right.

Q. Did you on this occasion show Max Schaffer and Norman Schaffer the merchandise that you had in the office?

A. Yes, I did. I left mine—while operating my business, I left most of it in the boxes, so they could pick out what they liked, and if they liked it, I would show them the bill and repack it in another box; or if the box is good, I would just retape it over and make a copy of A. Shaffer, and take the manufacturer's bill—

Mr. Coleman: Now, your Honor, this latter part is not responsive.

Q. Just tell us—excuse me—just tell us what you did on this particular occasion?

A. Well, he came up; I showed him the merchandise and the manufacturer's bill, describing the merchandise.

Q. Now, you say that Norman was there, too?

A. Yes.

Q. Did you show him this bill?

A. Yes, sir.

Q. During the time that you dealt with the Schaffers, [fol. 398] beginning sometime in the middle of May, as you say, until the end of July, did you show them copies of the manufacturer's invoice on the occasions that Max Schaffer came to the office?

A. Yes. I always kept the invoices.

Q. Did you show them to them?

A. Yes, I did.

Q. Did you show the manufacturer's invoice to Norman Schaffer on the occasions that he came to the office?

A. Yes, I did.

Q. Now, did there come a time that you had a conversation with Max Schaffer concerning the manufacturer's invoice?

A. Yes.

Q. When?

A. This is when he was up to the office, the same day that he came, the first day he came, which was a week after the conversation from 110 West 40th Street.

Q. This was sometime in May; is that correct?

A. That's right; May of 1953. I showed him the merchandise; I showed him the bill. I told him the price that I wanted to pay me, and he agreed. So I took my bill,

[fol. 399] and the manufacturer's bill of the merchandise, and showed it to him.

He said, "I want it."

I said, "All right, you want me to send you the copy?"

He said, "Yes."

"Well, if that is what you want, I will send my copy, A. Shaffler, with the manufacturer's bill."

Q. Did you send the invoice to him intact?

A. Well, well, I have—a lot of times I cut—they have a number on there—

Mr. Coleman: Your Honor, I object to that, "a lot of times." I understand we are dealing with one, with the first specific one, and I object to "a lot of times."

The Court: Sustained.

Q. Tell us what you did with this manufacturer's invoice on the first occasion?

A. Well, they have the consignee, showing, say, for instance, it was going to—

Mr. Coleman: Your Honor, I object to that as an illustration with respect to this first transaction. I think his answer is either specific or it must be stricken.

[fol. 400] The Court: Do you remember the name of the consignee at all?

The Witness: No, not on the manufacturer's bill.

The Court: The Government lawyer wants to know what you did with the invoice, the manufacturer's invoice, on this first occasion, when you were doing business with Max Schaffer? Do you remember what you did with the invoice?

The Witness: Yes, I would show it to him, if that is the merchandise that he picked out.

Mr. Coleman: I object to that, your Honor.

Are you interrogating, Mr. Moran, on the first shipment or purchase that was made by Max Schaffer from this man on 48 West 25th Street?

Mr. Moran: I am trying to find out from the witness what he did with the invoice that he is describing as sending to Max Schaffer.

Mr. Coleman: Your Honor, I object.

The Witness: Well, I would take—

Mr. Coleman: Just a minute, please.

I object. It is obvious that there must have been a first purchase from Shaffler at 48 West 25th Street. If [fol. 401] that is the transaction now being questioned about, then I object to the answer unless it is specifically with respect to that merchandise which became the subject of the first transaction.

The Court: Are you pressing the point that it is the very first transaction?

Mr. Moran: No, I am just trying to find out what the—

The Court: Then reframe your question and let's start all over again.

Q. Can you tell us what you did with the invoice, the manufacturer's invoice, when you sent the copy of the invoice to Schaffer? A. Well, I would take—

Mr. Coleman: Just a minute. I object to that question, because the question assumes that the witness had done something, which is not the subject of the question.

By the Court:

Q. Did you ever send any invoice to the Schaffers at all?

A. Yes, I did.

Q. Do you remember the first time you did it?

A. Yes, sir.

[fol. 402] Q. Now, tell us how you did it and what you did with that invoice the first time you did it?

A. Well, I would take the invoice and take my A. Shaffler bill. I would copy the same thing that is written on that invoice from these packages that my brother brought me, and put on the A. Shaffler bill, and write the identical information, style, quantity and price, and the full amount, the same ident—the same thing as the bill itself. Then I would take the invoice, I would cut the top half of it, which was identifying the original consignee that was supposed to go to. I would cut the bottom—there is numbers on the bottom of the bill; they have six or seven

numbers, and the name would be on there of the original manufacturer—I would just cut the numbers off and send it with the A. Shaffler bill, and pack it in the box, and send it to U. S. Packing.

By Mr. Moran:

Q. In other words, your style number was identical to the style number shown on the original manufacturer's bill?

A. That's right.

Q. And your unit price, or—and total price was the same?

[fol. 403] A. That is correct.

Q. And did you follow this procedure for the shipments of merchandise that you sent to Max Schaffer thereafter?

A. That is correct.

Q. And did you follow the same procedure with Norman Schaffer?

A. Yes, I did.

Q. Now, did there come a time when you had a conversation about the original manufacturer's invoice with Hyman Karp?

A. Yes.

Q. When?

A. In the middle of May of 1953, when I first started to do business with him.

Q. What conversation did you have? What did he say to you and what did you say to him?

A. Well, I told him, when we agreed with the price, and I told him I had children's wear on the premises now "that I can ship you, I will send you the copy of the manufacturer plus my own bill, is it all right?"

He said, "Yes, that is what I want," because I am new to them, I am taking this upon myself.

[fol. 404] Q. Did you identify yourself to Karp in this first conversation?

A. Yes. I said, "This is Tony." I said, "Remember me from 33—26th St.?"

I said, "Now, I am in for myself."

Q. Did there come a time when you had a conversation

with Benjamin T. Marco about the original manufacturer's invoice?

A. Yes.

Q. When?

A. In June of 1953.

Q. What conversation did you have? Tell us what you said and what Marco said to you?

A. Well, I told him that I was to Patty Ann Frocks, which Fred Kusnick operates, and I told him, "He recommended me to sell to you, and I get the latest merchandise that just come from manufacturers. Would you like to buy from me?"

He said, "Yes."

So I told him, "Well, I can start shipping now, if you want to."

He said, "What price ranges dresses do you have?"

And I told him, and he says, "Okay," he says, "you can [fol. 405] ship them."

I says, "Well, I will even give you the manufacturer's bill from the packages itself with my invoice; is that all right?"

He says, "Yes," and I also sent him the manufacturer's bill with my invoice of A. Shaffler.

Q. You did this on each and every occasion thereafter?

A. Yes, sir.

Q. Now, were there times when you sent the entire manufacturer's invoice to Max Schaffer?

A. Yes, there is times I would just scribble the consignee out of the original bill of these merchandise, just scribble the original consignee out, and cut their bill number on the bottom—if there's a bill number on top, I would cut the bill number on top—and keep a duplicate for myself.

Q. Of the manufacturer's invoice?

A. That is correct.

Q. And did you do the same thing with Norman Schaffer?

A. Yes, I did.

Q. And did you do the same thing with Hyman Karp?

A. Yes, I did.

[fol. 406] Q. And with Benjamin T. Marco?

A. That is correct.

Q. Now, on the occasions that you cut the portion of the invoice, of the manufacturer's invoice, and sent one portion of the invoice, did that portion of the invoice show the manufacturer's name on it anywhere?

A. Yes, right on the bottom. It would be right in the middle, just like they would have—they would have a big writing on top, on the bottom it would be in print of the same name.

Q. On those invoices that you did not cut anything other than numbers, did the invoice show the date?

A. Well, yes, a lot of them did show the date. It would be—it shows—there is a few boxes there, it would tell even a salesman, sometimes; it would describe even the salesman on that bottom half of the copy.

Q. And you say that there were occasions that you retained a copy of the original manufacturer's invoice?

A. Yes, I always kept a duplicate for myself. If they wanted to give me a return, it would refresh my memory of what they're giving me back, so I can tell only by the [fol. 407] duplicate. If I don't keep duplicate, I won't know what they give me back.

Q. And when you received payment, what did you do with the invoice, manufacturer's invoice?

A. Well, I would tear it up.

Q. And do what with it?

A. Well, on the ledger, where I make the amount that I ship to them, if they paid me, I just cross it right out; would have a bill number identifying the date that I sent it, the bill number and the amount, which would correspond the same with the bill.

The Court: It is 4:30. Are you going to another subject now?

Mr. Moran: We can adjourn here, your Honor.

The Court: We, ladies and gentlemen, we will adjourn for the evening and meet again tomorrow at 10:30.

Good night.

(Adjourned to April 22, 1958, at 10:30 A. M.)

[fol. 408]

IN UNITED STATES DISTRICT COURT

[Title omitted]

C. 145-232

C. 145-233

New York, April 22, 1958;
10.30 o'clock a.m.

Trial resumed.

(Jury in box.)

ANTHONY STRACUZZA, resumed.

Direct examination (continued).

By Mr. Moran:

Q. I believe that at the conclusion of your testimony yesterday, Mr. Stracuzza, you had testified as to a certain ledger that you had kept concerning your dealings with your customers; is that correct?

A. That's right.

Q. Now, would you tell us what this ledger looked like and what its purpose was?

A. Well, it's a big book, about a foot long, and I would make a notation of the invoice of A. Schafler, going to these stores, describing the dates, the bill number of my invoice and the amount of merchandise that had been shipped to these people.

Q. Did you keep in that ledger a separate record for each shipment that you made to each one of the defendants [fol. 409] now on trial, Max and Norman Schaffer, Hyman Karp and Benjamin T. Marco?

A. Yes, I kept records on—

Mr. Steinberg: May I respectfully ask your Honor to caution the witness again, as you did yesterday, to answer questions and no more?

The Court: Will you try to answer the question yes or no, if it calls for a yes or no answer, and not expand on it?

The Witness: Well, yes.

Q. I show you Government's Exhibit 52 for identification and ask you if you can identify this book?

A. This is the ledger book that I kept, like, for instance, "Schaffer," here, describing the dates; here is the bill number and the amount of the invoice being shipped to him. Also, Hyman Karp, of Fall River, Mass., dates—

Mr. Steinberg: May I respectfully object to any—

The Court: Sustained, yes.

Q. Just tell us what the book is, without telling us what is in there.

A. Well, this is the record that I shipped to these gentle-
[fol. 410] men here.

The Court: In other words, that is the ledger you just described, is it?

The Witness: That's right.

The Court: All right.

Q. Now, I direct your attention to the lefthand column of the page. Just tell us what those figures represent.

A. That is the date.

Q. The middle column of the page?

A. That is the amount.

Q. The invoice of amount?

A. Of my bill that I sent to them.

Q. And the last column, the third column, the righthand column?

A. That is the bill number of my invoice of A. Schafer.

Q. And you followed this procedure for each one of the defendants, Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco?

A. That is correct.

Q. Now I ask you what this line drawn diagonally across the page represents, through those three columns of figures?
[fol. 411] A. Well, when they would pay me—

Mr. Steinberg: I respectfully object to any testimony about an exhibit not in evidence.

The Court: Yes.

Do you offer it in evidence?

Mr. Moran: I am going to offer it now. I will let counsel examine it.

The Court: Was the book kept by you in the regular course of your business?

The Witness: Yes.

Mr. Steinberg: May I respectfully object to that question, if your Honor please. This business he was testifying to is not a business; it was a thieves' den.

The Court: You concede, do you, for all defendants that all of the goods were stolen?

Mr. Steinberg: I respectfully object to that.

The Court: What do you mean by "thieves' den," counsel? I don't understand that.

Mr. Steinberg: It was a business of selling and buying stolen merchandise, according to what I understood from the opening here, and if your Honor asks me to make [fol. 412] concessions before the jury, I respectfully except.

I move for the withdrawal of a juror.

The Court: I will deny it, because as I understood your opening, those were your very words.

Mr. Steinberg: If your Honor please, I except to that further statement and move for the withdrawal of a juror.

The Court: All right, you have an exception.

Mr. Steinberg: All right.

Now I object to your Honor's question about "regular course of business." The exception of the hearsay rule covered by "regular course of business" is to allow certain hearsay evidence, where there is a guarantee of authenticity from the fact that a legitimate business is carried on, and from the fact that legitimate business requires certain entries, and that does not exist in this case.

The Court: You may have an exception.

Mr. Moran: May I be heard for a minute on that, your Honor?

The Court: It seems to me it is moot now.

Mr. Moran: All right. I merely was going to say we are not offering it as a record kept in the regular course [fol. 413] of business.

* * * * * * *

[fol. 426] Direct examination resumed.

By Mr. Moran:

Q. Now, Mr. Stracuzza, I show you again Government's Exhibit 52, and I direct your attention to the page marked "Schaffer."

Mr. Steinberg: It is not marked "Schaffer," if your Honor please.

Mr. Moran: All right, "S-h-a-e-f."

Mr. Steinberg: Yes.

Q. (Continuing) And I direct your attention to the middle column, which you have identified as the amount of your invoice that you sent to Schaffer; is that correct?

A. That is correct.

Q. Now, does this figure in the middle column represent the amount of money that you received in payment of that invoice, or what does that represent?

[fol. 427] A. It represents the amount of the bill that I shipped to him.

Q. In other words, directing your attention here to the second line of 64, $403.92, under your invoice No. 12, did you receive $403.92, or a percentage of that?

A. A percentage of that.

Q. Now, is it your testimony that each one of the entries here under the page marked "S-h-a-e-f," that the items, the amounts here under your bill numbers represent only your bill numbers and not the payment that you received?

A. Only the bill number.

Q. In other words, this middle column, you received a percentage of the figure shown there?

A. That is correct.

Q. And each one of these lines drawn diagonally across the page represents a payment of those invoices; is that correct?

A. That is correct.

Mr. Steinberg: I think, just to correct the record, you mean straight across, not diagonally.

Mr. Moran: Straight across. I am sorry.

Q. Now directing your attention to the page marked [fol. 428] "F and R," to the middle column there, which you have identified as being the amount of your bill, did you receive from Hyman Karp the amounts shown there on that page, or a percentage of those amounts?

A. A percentage of those amounts.

Q. I direct your attention to the page marked "Marco's," and to the center column there, the figures that you have identified as being the amount of your bill numbers; do those figures represent the amount of your payment, or did you receive a percentage of that amount?

A. A percentage of that amount.

Q. Now, for these groups of figures on the page under the title "Marco," that are not crossed out, is it your testimony that you did not receive payment for those bills; is that correct?

A. That is correct.

Mr. Coleman: May I see that a minute, Mr. Moran? Thank you.

Q. I believe yesterday you testified that you first started to do business with Hyman Karp sometime in the middle of May 1953, and that business—

[fol. 429] Mr. Steinberg: Is that so? I mean, does the witness acknowledge that?

Q. Is that correct?

A. That is correct.

Q. And that business was initiated by a telephone conversation that you made or had with Hyman Karp at that time.

A. That's right.

Q. Now, when you were on 26th Street during the period from September of 1952 until May, or rather March of 1953, did there come a time when you made a shipment of zoot suits to Hyman Karp?

A. Yes, I did.

Q. Can you tell us when this shipment was made?

A. Shipment was made in March of 1953.

Q. Getting back to 25th Street, after this initial conversation that you had with Karp on the telephone in the middle of May 1953, did there come a time when you had a further conversation with Hyman Karp?

A. Yes. I remember him calling—

Q. Just tell us if you did or not.

A. Yes, I did.

Q. Can you tell us when this subsequent conversation [fol. 430] took place?

A. Say, in about the, about the third week of May.

Q. 1953?

A. 1953.

Q. Can you tell us what you said to Karp and what he said to you on that occasion?

Mr. Coleman: If your Honor please, at this point I would like to note for the record that there is an objection to these declarations or conversations between the witness and Mr. Karp as not being binding upon the defendants Max Schaffer and Norman Schaffer.

The Court: That is true. It is not binding on those defendants not named, until the Government proves its conspiracy charge.

Mr. Coleman: I just wanted that, so that I won't have to repeat it each time, your Honor.

Mr. Katz: We, of course, have the same comment, your Honor.

The Court: I said all defendants except those named.

Mr. Katz: Yes, sir.

The Court: You were about to tell us what you said and he said.

Mr. Steinberg: May I just, if your Honor please, ask [fol. 431] was this by phone or in person, or where?

The Court: I think he said by phone. I will ask him: was this by phone?

The Witness: Yes, sir.

The Court: And the phone call was between what cities?

The Witness: Fall River, Massachusetts, and myself, on 25th Street. He called me up and told me if I had protection in New York. I told him that I did. I says, "Don't worry," I said, "I can take care of my end." I says, "Don't worry."

Q. Would you speak—

Mr. Katz: I can't hear you.

Q. Would you speak up a little louder?

A. (Continuing) He said, "Can you take care of New York?" Because I am doing this myself, I wasn't with Hymie Berk, like on Third—excuse me, on 26th Street, because Berk just had certain ways of telling me what to do and what not to do. Here I took it upon myself, so I didn't have protection, but I told him I did have protection.

Q. Is that the entire conversation at that time?

[fol. 432] A. Well, that is all. It was just pertaining to if I had protection. I says, I says, "Yes."

He says, "Well," he says, "that is all I want to know, because," he says, "I don't want no trouble."

I says, "Don't worry about it."

Q. Now, did Hyman Karp come to your office when you were on 25th Street?

A. No, he never did.

Q. And how was your business conducted with him?

A. By telephone.

Q. All by telephone?

A. Yes, sir.

Q. Would you call him?

A. Well, I would call him if I were in doubt on, say, for instance, a very big amount of one style, and I'd want to know if he would accept it, because there was one time I did send him a big amount of children's blouses and he told me, he said, "I won't pay you this price, because the price is wrong on this here."

But I had a regular manufacturer's bill, and I believe that this is the price, because every other manufacturer's bill was no different than the bill of this children's blouses [fol. 433] I sent him.

Q. And you had conversations like this?

Mr. Steinberg: May we have no leading, if your Honor please?

The Court: Yes, don't lead him.

Mr. Moran: All right.

Q. Did you have conversations at other times?

A. Well, there was one time I remember him calling me. He told me, he says—

Q. Can you fix the time, first of all?

A. It might have been, say, about the third week of June. He says, "I am going on a vacation," he says. He says, "You can keep sending the shipments in."

And I says, "All right," and I kept doing it.

Q. Now, did you keep a record of the invoices that you sent to Karp?

A. Yes, I did.

Q. I show you Government's Exhibit No. 53 for identification, and ask you if you can identify this?

A. Yes, this is—a duplicate copy of the original invoice of A. Schafler that I sent to him. I would put my original [fol. 434] copy on here, put a carbon under it, and write the same identifying marks from the manufacturer's bill onto my original copy, leaving me a duplicate.

Q. Speak up a little louder.

A. I said that I would send him an original bill with a carbon under it, making this a duplicate, so in case he had a discrepancy pertaining to the merchandise I shipped him, only through this bill number would I be able to identify what he is talking about.

Q. Now, did you keep this, or did you keep such a record, referred to in Government's Exhibit 53 for identification, from the start of your business dealings with Karp?

A. Well, I wouldn't say right at the beginning, no, I did not.

Q. Would you tell us when you did begin to make such a record?

A. Well, I started to make a record of duplicates for only one simple reason:—

Mr. Steinberg: May it please the Court—

Q. Just when?

A. When? This was in June.

[fol. 435] Mr. Steinberg: That is the answer, if your Honor please.

The Court: You don't want the year?

Mr. Steinberg: Well, I assume it was '53.

Q. Is it '53?

A. Yes, sir; 1953.

Q. And you didn't make it before that time?
A. No, I did not.

Mr. Moran: I offer this in evidence.

* * * * * * *

[fol. 441] Direct examination resumed.

By Mr. Moran:

Q. Directing your attention again to Government's Exhibit 53, did you keep any other copies of invoices that you sent to Hyman Karp at Fall River Bargain Center? Is this your only record?
A. This is my only record.

Mr. Moran: May I show these books to the jury, your Honor?
The Court: Yes.

(Exhibits handed to jury.)

The Court: Let's get on with the case, can't you?

Q. I show you Government's Exhibit 54 for identification through Government's Exhibit 107 for identification, and I ask you if you can identify these?
A. Yes, these are my invoices. It is a duplicate of my invoice that I sent to Fall River, Massachusetts. These are the same copies of the manufacturer's invoice. These are my original invoices.
[fol. 442] Q. Now, directing your attention to Government's Exhibit 54 for identification, I ask you what does this lefthand column represent?
A. That represents the style.
Q. The style number?
A. Yes, of the merchandise.
Q. And what does this second column represent?
A. That represents the quantity, the amount.
Q. And the next column?
A. Describing dozens, how many pieces.
Q. And the next column?
A. The price of a dozen.
Q. And the final column?

A. Total amount of that dozen.

Q. And at the bottom of the last column, what does that figure represent?

A. Total amount of the whole invoice.

Q. And did you use the same description in each one of Government's Exhibit 54 for identification through 107?

A. Yes.

Mr. Coleman: Pardon me? Did I understand that 54 to 107 the witness identified as duplicates to Karp at Fall River?

[fol. 443] Mr. Moran: That is correct.

Mr. Coleman: No other of the defendants?

Mr. Moran: Yes.

Mr. Coleman: I see, all right. I just wanted to make sure.

Q. Now, those style numbers reflected on those bills—

Mr. Steinberg: I object to anything not in evidence. If he wants to offer it, I will be glad to look at it. I may agree, but I object to questions on papers not in evidence.

The Court: I will allow it.

Mr. Steinberg: Exception.

Q. Those bills, the style numbers on those bills, were they the same as the style numbers on the original manufacturer's invoices?

A. Yes, they are.

Q. And the prices were the same?

A. Correct.

Mr. Steinberg: I object to leading, if your Honor please

The Court: Yes, you are leading.

Q. Will you tell us what information is reflected on those bills that were on the manufacturers' invoices?

[fol. 444] A. Each invoice describes the contents of a package, and the same notations of a manufacturer's invoice, from style of the merchandise in there, to the prices, identifying the same amount, the same quantity as a manufacturer's invoice, just making another copy of it. This is my—would be the same as my original invoice.

[fol. 458] Direct examination resumed.

By Mr. Moran:

Q. During the time that you were doing business with Benjamin T. Marco, under the name of A. Schaffer, on 25th Street, did there come a time when he came to your office?

A. Yes, he did.

Q. When?

A. About the second week of June of 1953.

Q. Will you tell us what, if anything you did on that occasion?

A. Well, he'd come up to my office. I had the packages displayed on the floor, as well as some coats on a rack. He picked out then and there whatever he had wanted. I showed him the invoice, describing how many was in the package that he wanted. He would say, "That's okay for me," and I would—

Q. When you say "the invoice," what do you mean?

A. The manufacturer's bill of the package.

Q. Was this the only occasion that Marco came?

A. No, he came on about three occasions.

[fol. 459] Q. When was the next occasion after the first occasion?

A. I'd say about the first week of July, and then he came with his wife, I believe, that it was his wife, around the third week of July of 1953.

Q. Now, would you tell us what happened, if anything, during the second meeting that you had with Marco in the first week in July?

A. Well, he had come up in the same respect, to look at the merchandise. I would show him the manufacturer's bill of the merchandise, and see if he liked it. If he liked it, I would get it ready for the Railway Express for him.

Q. Now, what happened on this third occasion that you spoke of?

A. Then he came in with his wife. I didn't have no conversation. Introduced me to her, and I said, "Hello," that is all.

Mr. Katz: I can't hear him, I am sorry.

The Court: Keep your voice up.

He said he had no conversation with the lady; just was introduced.

The Witness: Yes.

Q. Did you have any conversation with Marco?

[fol. 460] A. Yes, I did.

Q. What did you say to him and what did he say to you?

A. Well, he says, "Look, I want a lot of nice things and don't send me too much of a number."

I said, "Okay." I says, "Sometimes I can't help it, because the driver sometimes would give me a repeat, the manufacturer would be the same, and the same style"—

Mr. Katz: If your Honor please, I object. It appears that this is not a conversation with Marco, but his explanation.

The Court: Was this the conversation you had with Mr. Marco or not?

The Witness: Yes, this is the conversation with Marco.

The Court: All right, continue.

Objection overruled.

Q. Would you continue with what you said in this conversation?

A. He says, "Don't give me a lot of one style."

So I says, "I will try not to, but there is times I can't help it, because the driver sometimes gets the same manufacturer, and a lot of times they have a lot of the same [fol. 461] styles, and once in a while we have a different style than that." I says, "I can't help it. If you don't want it, just tell me. I just can't break up a package, and otherwise it spoils the whole contents. Then I have to change boxes and everything. I always try to sell the package as is."

Q. During the time you were dealing with Marco, did there come a time that you had a telephone conversation with him?

A. Yes, I did have a telephone conversation.

Q. When?

A. This was about the second week of July, telling me that I am sending him too much of one number and too

much of high-priced dresses, gave him a lot of 23.75 dresses. He says, "It's no good," he says, "I am going to return your merchandise."

I says, "Marco," I says, "if you return me merchandise," I says, "I don't want to do business with you no more," I says, "because I don't want no aggravation. I'm giving you the latest; it's brand new; it's first coming from the manufacturer. You have to buy it that way if you want [fol. 462] that price range merchandise."

Q. Did Marco, in fact, return merchandise to you from time to time?

A. Yes, he did.

Q. Did you communicate with Marco by any other means than over the telephone?

A. I wrote him a letter at one time.

Q. Did you receive replies?

A. Yes, I did. I remember—

Q. I show you Government's Exhibit 121 and ask you if you can identify the writing attached to that?

A. Yes, this is a letter that I sent to him in my handwriting, to Marco, telling him that I buy my merchandise, and that I don't want him to try to pay me less, which he has been trying to do. I told him how much I wanted.

Mr. Moran: May I show this to the jury, your Honor?

Mr. Katz: May I inquire, please, is that the copy of the correspondence which we turned over to the FBI, and of which a photostatic copy was made?

Mr. Moran: If the witness knows.

Mr. Katz: Do you know that?

The Witness: Excuse me?

[fol. 463] Mr. Katz: Do you know that, Mr. Moran?

Mr. Moran: I am not a witness here.

Mr. Katz: I just asked the question.

The Court: You will have an opportunity to cross-examine him. I suppose this is an exhibit in evidence.

Mr. Moran: It has been received in evidence.

The Court: Go ahead.

Wouldn't it be easier to read it instead of having the people look at it?

Mr. Moran: All right.

The top of the page:

"Benjamin Marco. I buy my merchandise. I don't manufacture it. I have never sold for less than 65 per cent. I have four firms to sell to. He who pays me quickest gets the most goods, as you can see for yourself. I am not going to argue with you, but beginning with this shipment No. 63 I won't take less than 65 per cent, which is going to be all fall goods.

"Yours truly, A. Schafler."

The Court: Would this be a convenient time for a recess, Mr. Moran?

Mr. Moran: All right.

[fol. 464] The Court: We will take a short recess.

(Short recess.)

By Mr. Moran:

Q. Now, did you receive at any time correspondence from Marco?

A. Yes, I did.

Q. I show you Government's Exhibit 159 for identification and ask you if you can identify that document?

A. Yes. He showed me bill numbers of merchandise.

Q. Just tell us what it is.

A. It is a letter that he has wrote to me, describing what he has.

Mr. Katz: We object.

A. (Continuing) Paying me for—

Mr. Katz: We object.

A. (Continuing) Paying me for—

Mr. Katz: As to the contents of the letter, we understand that is the letter that he wrote.

I would like to see it.

(After looking) No objection.

Mr. Steinberg: May I have the number, please?

Mr. Moran: 159.

[fol. 465] May I read these to the jury, your Honor?

Mr. Coleman: Same objection, your Honor.

The Court: Same ruling. It is admitted against Marco only, subject to connection by the Government as to the other defendants.

(Government's Exhibit 159 received in evidence.)

Mr. Moran: (To the jury) This is on the letterhead of the Hotel Matz, Bluefield, West Virginia.

(Read to jury.)

Mr. Moran: The second one is on the stationery of Hotel Matz, Bluefield, West Virginia.

(Read to jury.)

Mr. Katz: Do you have a date to that letter, Mr. Moran?

Mr. Moran: There is no date.

By Mr. Moran:

Q. Did you receive payment for the merchandise that you went to Marco?

A. Did I receive payment?

Q. Yes.

A. Yes, I did.

Q. By what means?

A. By check.

[fol. 466] Q. Did you receive payment for all the merchandise that you sent to Marco during the time that you were dealing with him?

A. Not for all of them, no.

Q. I show you Government's Exhibits 160 through 174 and ask you if you can identify these documents?

A. Yes, these are photostatic copies of checks Marco has sent to A. Schafler.

Q. You are referring now to Government's Exhibits 160 through 173. Now, I direct your attention to Government's Exhibit 174 for identification.

A. Yes. That is a—that is a original check that Marco has sent to A. Schafler.

Q. I direct your attention to the back of Government's Exhibit 160 for identification. Are those signatures on the back of that check in your handwriting?

A. Yes, they are.

Q. And directing your attention now to the balance of those exhibits, from 161 to 173, are the signatures on the back of those checks in your handwriting?

A. Yes, they are.

[fol. 467] Q. I show you again Government's Exhibit 174 for identification; does your name appear anywhere on the back of that check?

A. No, it does not.

Q. But this is a check that you received from Benjamin T. Marco?

A. That is correct.

Mr. Moran: I offer these in evidence.

Mr. Katz: May I just look at the last?

(After looking) No objection.

Mr. Steinberg: Your Honor, same ruling?

The Court: Same ruling, yes.

(Government's Exhibits 160 through 174, inclusive, received in evidence.)

Q. Now, with this merchandise that you sent to Benjamin T. Marco, is it your testimony that you included a portion of the manufacturer's invoice?

Mr. Katz: Your Honor, we object to the leading form of the question.

The Court: Sustained.

Mr. Moran: All right, I have no further questions, your Honor.

* * * * * * *

[fol. 468] Cross examination.

By Mr. Steinberg:

* * * * * * *

[fol. 574] Q. How many accounts did you know that you were dealing with?

A. I knew this Beatrice Goldman, of Molly Zeitzner. I knew this Fred Kuznik of Patty Ann Frocks. I knew this Fleischers, of Hagerstown, Maryland. I knew this Marco,

of Bluefield, West Virginia, the Schaffers of Lebanon, Pennsylvania, and Fall River Bargain Center.

Q. When did you start that Schafler business?

A. Schafler?

Q. Yes.

A. In May of 1953.

Q. And you were arrested in July of '53?

A. That is correct.

Q. So you had about two and a half months of operation before you were arrested; is that right?

A. Yes.

Q. And in that two and a half months you did business [fol. 575] with eight different firms. Did you list eight? I don't know how many you listed, I am sorry. Let's see if I can list them again.

* * * * * * *

[fol. 765] Q. Very good. Now, the purchases made from A. Schafler by Max and Norman Schaffer were generally for merchandise that was selected by them on the premises; correct?

A. If they are there in person, they can select on the premises, yes.

Q. I asked you, Mr. Stracuzza, whether or not most of all of the purchases that they made from A. Schafler were purchases made by selection by them on the premises [fol. 766] themselves; isn't that true?

A. Yes.

* * * * * * *

[fol. 825] CHARLES W. MILLER, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

By Mr. Moran:

* * * * * * *

[fol. 830] Q. Was there some other point, some other vantage point, from which you made a surveillance?

A. Yes. We maintained a surveillance of the Stracuzza

office, which was designated as A. Schafler. We maintained a surveillance from a point directly across the street from their office, in the fourth story of that building.

Q. What was the address of that building?

[fol. 831] A. The address of that building was 45 West 25th Street; was occupied by the Acme Bedding Company.

Q. And how long was this surveillance maintained?

A. It was maintained intermittently from July 17, 1953, until July 28, 1953.

Q. And what happened on July 28th?

A. On July 28, 1953, at approximately 12:35 P.M., Mario, Tony and Dorothy Stracuzza were placed under arrest.

Q. Now, can you tell us any particular day that you made a surveillance from this place across the street?

A. On July 20, 1953, I maintained a surveillance of this room across the street from Mr. Stracuzza's business.

Q. For what period of time that day?

A. From approximately 10 A.M. until 4:45 P.M.

Q. Now, would you tell us what you observed on that occasion?

A. I observed Mario, Dorothy and Tony Stracuzza in the office on various occasion. Mario could come in and leave throughout the day. I could see him on the street getting into his truck, driving away. He would come back on three or four occasions, and bring cartons back. Tony and Dor-

[fol. 832] othy were engaged in packing cartons, removing articles which appeared to be clothing from cartons. They were looking at papers that they would remove from cartons. They would tear up papers and throw them in a carton, which was right outside their door, in a corridor. They packed cartons. I could see them also when a carton would be up at a window, it would appear to be black crayon mark off on the front of the carton.

Q. Would you describe to us from the place you were making these observations the general description of the room 409?

A. It was an unused portion of a storeroom of the Acme Bedding Company. It was on the extreme west end of the building, directly across the street, at a distance of about a hundred feet.

Q. Now, can you describe the conditions of room 409 from this vantage point?

A. Room 409 was a room that had very light colored walls. It was approximately 15 feet deep, and I would say about 20 feet in, across the front of the building.

Q. Was there a door in the room?

A. The door leading into the room was directly opposite [fol. 833] the window from our vantage point.

Q. What activities did you observe, other than you have described on this day, in room 409?

A. During the afternoon I saw Mario and Tony take several cartons from the room, which they put in Mario's truck. From my position I could see that the cartons had letterings on it, indicating that they were to Schaffer's, at Lebanon, Pennsylvania, and to the Fall River Garment Center, Fall River, Massachusetts. On another occasion I saw two men enter the room and remove, I believe it was, four cartons from the room. When I reached the street, I could see that the carton had the name "Marco" on it. I do not know where it was designated to.

Q. Now, during the course of your investigation, did there come a time that you had a conversation with the superintendent of the building there?

A. There was.

Q. And can you tell us what if anything you did as a result of this conversation?

A. As a result of this conversation, on July 23rd, 24th and 25th, 1953, prior to 8 o'clock in the morning, I went to the fourth floor of 48 West 25th Street and removed cartons of trash which were immediately outside of the door [fol. 834] of A. Schafler.

Q. And have you retained the contents of this trash?

A. I have.

Q. I show you Government's Exhibit 175 for identification and ask you if you can identify this?

A. I can.

Q. Can you tell us what those papers are?

A. Well, these are torn pieces of paper that were in the trash on July 23, 1953, which I attempted to piece together by means of Scotch tape.

Mr. Moran: May I approach the bench for a minute, your Honor?

(Discussion at the bench off the record.)

Q. Agent Miller, I show you Government's Exhibit 176 for identification and ask you if you can identify this?

A. These are portions of pieces of paper that I found in the trash on July 24, 1953, that I attempted to piece together by means of Scotch tape.

Mr. Steinberg: Excuse me, sir.
Mr. Moran, what is your exhibit?
The Court: 175.
Mr. Steinberg: Thank you.

[fol. 835] Q. Agent Miller, I show you Government's Exhibit 177 and ask you if you can identify this?

A. These likewise are pieces, torn pieces of paper, that I found in the trash on July 25, 1953, and that I attempted to piece together by means of Scotch tape.

* * * * * * *

[fol. 879] Lawrence Winsch, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

By Mr. Moran:

Q. Mr Winsch, what is your occupation?

A. I am presently vice-president of the Photo Reprint Corporation, at 40 Wall Street.

Q. How long have you been associated with that firm?

A. Approximately four and a half years.

Q. Was there a time subsequent to that when you were employed by the Federal Bureau of Investigation?

A. Yes, sir; up to August of 1953.

Q. And in what capacity?

A. As a photographer.

Q. During your employment with the Federal Bureau of Investigation, were you assigned to make observations of a place of business on West 25th Street?

A. Yes, sir.

Q. On what day?

A. July 28, 1953.

Q. And would you tell us what you observed on that [fol. 880] particular day, fixing the time if you can?

A. Well, on that morning, on the plant beside myself was Special Agent Bryan Mogen.

Mr. Coleman: Would you speak louder, please?

The Court: On that morning on the plant Special Agent—

The Witness: Bryan Mogen was with me.

Q. What do you mean by "Plant", first of all?

A. Well, the plant was an operational point that we had directly across the street from 48 West 25th Street.

We were on the fourth floor, and we were to observe activities in Room 409 of 48 West 25th Street.

Q. And what did you observe, sir?

A. About 11.15 in the morning there were two people in the office, whom we definitely established the identity. That was Anthony Stracuzza and Dorothy Stracuzza. About 11.15 a third individual came in. He was about 50.

Mr. Coleman: I am sorry. I can't hear you.

The Court: You say he was about 50?

The Witness: He was about 50 years of age.

[fol. 881] A. (Continuing) Tall, and he was balding, and he stayed in the office between 11.15 and 12.15, and during that time he had lengthy conversations with Mr. Stracuzza.

He inspected boxes and cartons that were in the office. At one time Mr. Stracuzza went over to his desk and he gave him a sheaf of papers to go through. He inspected those papers. He seemed to be comparing some of the papers with some of the boxes he was opening and looking into, inspecting, and then would give them back to Mr. Stracuzza; and about 12.15 he left, and he went out to the street and disappeared down 25th Street.

Q. Do you see that person in the courtroom today?

A. Yes, sir; I do.

Q. Can you point him out to us?

A. Last man on the right, right up here.

Mr. Moran: May the record indicate that the witness has identified the defendant Max Schaffer.

Q. Now, during this course of time that you were making this observation, did there come a time that you took motion pictures of this premises?

A. Yes. During this period of 11.15 and 12.15 we took [fol. 882] films.

* * * * * * *

[fol. 891] JACK C. JOLLEY, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

By Mr. Moran:

* * * * * * *

[fol. 896] The Court: Yes. You said that you assisted in making some arrests and identifying certain cartons, and you said you saw some man come in around 4:30. Now, did you do anything else?

The Witness: Yes. I identified myself to the man as a special agent of the Bureau and asked him who he was. He hesitated—

The Court: No, no, from here on—

Mr. Moran: All right.

Q. Now, did you have a conversation with this person? A. Yes, I did.

Q. And what did he say to you and what did you say to him?

Mr. Steinberg: I object to that unless the person is identified.

The Court: Yes.

Q. All right, do you see this person in the courtroom? A. Yes, sir, I do.

Q. Can you point him out to us?

[fol. 897] A. Yes, it is the gentleman down here at the end of the table.

Mr. Moran: May the record indicate that the witness has identified the defendant Max Schaffer.

Q. Now, what did he say to you?

Mr. Steinberg: Just a second.

If your Honor please, I object to that, in so far as the defendant Karp is concerned.

The Court: Well, yes, it relates only to Schaffer until the Government connects it.

Mr. Steinberg: Exactly, your Honor.

Mr. Katz: Same as to the defendant Marco.

Mr. Coleman: Your Honor, at this point, and also on the record, as to Norman Schaffer, I understand it was just with the man you have identified, the conversation that you--

The Witness: Sir?

Mr. Coleman: I understand from the answer the conversation was with a gentleman whom he has identified as Max Schaffer. So at this point this conversation would not be binding on Norman Schaffer.

The Court: That is correct.

Mr. Coleman: Yes.

Q. Would you state now what if any conversation you had with Max Schaffer?

[fol. 898] A. Yes. I asked him who he was, and he identified himself; and I asked him what he was doing there, and he told me that he had a clothing store in Lebanon, Pennsylvania, and that he had just arrived in town that day and had a phone call from someone, identifying himself as "Tony," and that Tony had some nice buys in ladies' clothing for him; and he further stated that that was his first trip in there; he had just come in to see what Tony had for sale, and he had never been there before; and that is roughly just about all he said.

Q. Now, at the conclusion of this interview, did you obtain a signed statement from Max Schaffer?

A. Yes, yes, sir; I did.

(Marked Government's Exhibit 189 for identification.)

Q. Mr. Jolley, I show you Government's Exhibit 189 for identification and ask you if you can identify this?

A. Yes, sir. This is a statement I took that afternoon in my handwriting.

Q. Is this statement in your handwriting?

A. Yes, sir; I wrote it.

Q. And is the signature at the bottom of that in the [fol. 899] handwriting, or was it signed by the defendant Max Schaffer?

A. Yes, he signed it.

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[fol. 899a]

GOVERNMENT'S EXHIBIT 189

Signed sworn statement of the defendant Max Schaffer.

(OFFSET)

[For convenience of Court and Counsel this Exhibit is bound in on the opposite page.]

New York City
7-28-53

I, May Schaffer, made the following voluntary statement to Jack C. Jolley and Howard La Dube, who have identified themselves as Special Agents of the Federal Bureau of Investigation. I have been advised of my right to a lawyer and that I do not have to make a statement. I have been told that it may be used in court.

My name is May Schaffer and I own and operate a store in Lebanon, Pa. I wish to say that I do not know and have never done business with a man named Tony who operated at 48 W 25th Street, New York City. I would also like to say that I have never done business with the A. Schaffer Co., 48 W 25th Street, Phone Number Oregon 5-4224, I say that except for my one trip to 48 W 25th Street New York City, at about 4 PM on 7-28-53.

May Schaffer

Jack C. Jolley, F.B.I., New York City, 7-28-53
Howard C. LaDube, F.B.I. New York 7-28-53

Q. Was there any conversation between you and Mr. Marco concerning this?

A. The labels in this particular thing that we got in was only sold by one store in the town.

Q. And what store was this?

A. It was A. W. Cox.

Q. That was another department store in Bluefield?

A. Yes.

Q. Did you have a conversation about this with Mr. Marco?

A. Well, it was just that we could sell it so much cheaper.

Q. And what did he say? Did he say anything further?

A. He said it was stolen.

Q. And did he say anything concerning the person or persons from which he obtained this merchandise?

A. Not at that time, no.

Q. Did he at some future time have a conversation with you concerning this source of merchandise?

A. Well, he had the conversation with everybody in [fol. 998] the store.

Q. Well, what did he say?

A. You mean from who?

Q. Yes.

A. Well, there were several people he got—

Q. Do you recall any of their names?

A. Well, there was Freddie Kusnick, Sol Eisenberg, Sol Green—can't remember.

Q. Any other names that you can recall?

A. (No response.)

Q. Was the name Hyman Berk mentioned?

A. Yes.

Q. In the same category?

A. Yes.

Q. As being persons who furnished Marco with stolen merchandise?

A. Yes.

Mr. Katz: If your Honor please, I will object to that. I don't believe the witness testified to that. It is also leading.

The Court: Did he say he received stolen merchandise from these people?

The Witness: Yes, sir.

• • • • • • •

[fol. 1002] The Court: And the question the District Attorney asked you now is what did you do or what did you see other employees do with regard to that merchandise?

The Witness: Cut labels out.

The Court: Cut labels out of the merchandise?

The Witness: Yes.

The Court: Cut labels out of the merchandise.

The Witness: Yes.

By Mr. Moran:

Q. What was done with these labels?

A. Just throw them away.

Q. Did you throw them away, or did you see somebody else throw them away?

A. I don't know who threw them away.

Mr. Steinberg: I can't hear the witness.

The Court: Keep your voice up.

A. (Repeating) I don't remember who threw them away.

[fol. 1003] Q. Do you recall the name or names that appeared on these labels?

A. There was one, "Sears and Roebuck," yes.

• • • • • • •

[fol. 1004] Q. Mr. Marco was quite a clowner, wasn't he?

The Court: He was what?

Mr. Katz: Clowner, clowner.

The Court: I'm sorry.

Q. He was always joking around, wasn't he?

A. Oh, yes, anybody in the city could tell you that.

Q. Anyone in the city could tell you that. And, as a matter of fact, when he told you, Mrs. D'Andrea, about stealing, he was actually joking and teasing, wasn't he?

Mr. Moran: I object to that, your Honor.

The Court: No, I will allow that.

Q. Wasn't that a fact?

A. I thought so, yes.

Q. And I believe you said that he made the same statement there in front of all the girls; isn't that right?

A. That's right.

Q. And, as a matter of fact, he would even make the [fol. 1005] same statement in front of customers, wouldn't he, at times?

A. I suppose so.

The Court: Well, the question is—

Mr. Moran: I move to strike out the answer.

The Court: The question is, did you hear him make the same statement in front of customers?

The Witness: Yes.

* * * * * * *

[fol. 1007] Redirect examination.

By Mr. Moran:

By the Court:

Q. You said that there was a time when you talked to Mr. Marco about some coats that had labels, that were sold in another store.

A. I didn't say anything about coats. I said suits.

Q. Suits. I am sorry. Do you remember the name of the label in the suits?

A. Donneybrook.

Q. Donneybrook?

A. Yes.

Q. And do you know what the other store sold those suits for with that label?

A. You mean the price?

Q. Price, yes.

A. No, I don't remember.

[fol. 1008] Q. Well, do you remember whether your store was selling them at the same price, or more, or less?

A. I think it was less.

Q. And how much less?

A. Oh, 10, 15, 20 dollars, I don't remember. I know it was enough for a customer to get excited about.

* * * * * * *

[fol. 1011] SALLIE MAE ALLEY, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Moran:

* * * * * * *

[fol. 1014] Q. Can you tell us what period of time you were employed in 1953?

A. Wasn't for very long. It could have been June and July.

Q. Was it some time earlier than that?

A. It could have been. I don't just recall the dates. It's been too long.

Q. What kind of work did you do for Mr. Marco during both of these periods of time?

A. I was a saleslady.

Q. Any particular item of merchandise that you sold?

A. Mostly in coats and suits.

Q. Do you recall any of the names of the persons from whom Mr. Marco purchased the merchandise that was received in Marco's store?

A. I didn't check in the merchandise. I don't know the names.

Q. Do you recall—does the name "A. Schafler" mean anything to you?

A. I have heard Mr. Marco speak of him, but I don't know what shipments he got from him.

Q. Can you tell us whether he did receive any shipments from A. Schafler?

[fol. 1015] A. Not definite, no.

Q. Can you tell us what if anything you did with merchandise during the period of time that you were employed in 1953?

A. Well, I stocked the merchandise, helped keep it clean and sold it.

Q. Did you do anything with labels?

A. Oh, yes, we sewed in labels.

Q. Did these garments have labels in them before you sewed the other labels on them?

A. Not to my memory.

Q. How long had you done this type of sales work?

A. I started when I was 17 years old. I was out quite a while when my son was growing up.

Q. And for approximately how long a period was this?

A. When I was out of the—

Q. No, from the time you first started doing sales work?

A. Well, I am 63 years old, and I started in the store when I was 17.

Q. Had you ever sewn in labels before?

A. No, sir.

Q. In the other employments you had?

[fol. 1016] A. No, sir.

Q. Did any other employees sew labels in garments?

A. Yes.

Q. Do you know their names?

A. Well, Mrs. Froye.

Q. F-r-o-y-e, is that spelled?

A. I believe it is.

Q. Any other employee?

A. No, we only kept a couple of saleslaadies outside of Mrs. Froye.

Q. Was there any other person in the store that did it?

A. Mrs. Marco helped us out sometimes.

Q. Do you recall any particular garment in which you sewed labels?

A. The only thing I sewed labels was in coats and suits.

Q. Do you recall the name of any particular label?

A. Not of the coats, no. I think we handled the Donneybrook and Madamoiselle, and suits of that brand.

Q. Did you sew labels in?

A. Yes.

. . . . . .

[fol. 1030] Q. Mrs. Alley, did you speak to me in my office less than an hour ago concerning your testimony?

A. Yes.

Q. Did I ask you a question similar to the one I just asked you, concerning any statement that Mr. Marco had made concerning this investigation?

A. Oh, you mean in intimidating people?

Q. I ask you the question again, as to whether he said anything at that time?

A. He said it, but whether he was kidding, sincere, I don't know.

Q. Well, I will just ask you to tell us the conversation. That is a conclusion for the jury.

Mr. Steinberg: If your Honor please, I object to that statement and I ask that your Honor again, in view of the nature of this testimony, rule it has no bearing on Mr. [fol. 1031] Karp, because it is so prejudicial.

The Court: I don't really think it is necessary. I have given you a blanket exception on it.

Mr. Steinberg: I know, but this is different from the other, if your Honor please. I also object to the District Attorney's statement.

The Court: I think it's enough.

Tell us what he said, Madam, if you remember.

The Witness: Well, he was sitting there one day and he said anybody that would cause him to do time, he'd get him.

Mr. Moran: That is all.

The Court: Does anybody want to cross-examine this lady?

Mr. Steinberg: I have no questions, your Honor.

Mr. Katz: I have some.

Excuse me, your Honor, for one minute.

Cross examination.

By Mr. Katz:

Q. Mrs. Alley, Mr. Marco had a tendency to kid and joke around a lot, didn't he?

A. He certainly did.

Q. And have you made a—you made a statement here [fol. 1032] to the effect that anyone who would cause him trouble, or something, would cause him to do time, that he would get him; did you take him seriously, any such statement?

A. It didn't scare me.

Q. What's that?

A. It didn't scare me.

Q. And you didn't take him seriously, did you?

A. No, I didn't, not too much so. In other words, you didn't know how to take him seriously.

* * * * * * *

[fol. 1122] JOHN B. DAVIDSON, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Moran:

Q. By whom are you employed, Mr. Davidson?

A. The Federal Bureau of Investigation.

Q. And how long have you been so employed?

A. 16 years.

Q. Where are you presently assigned?

A. I am resident agent at New Bedford, Massachusetts.

Q. How long have you been assigned there?

A. Since 1951.

Q. In the course of your official duties did you have occasion to investigate a business concern known as the Fall River Bargain Center, in Fall River, Massachusetts?

A. Yes, I did.

[fol. 1123] Q. And did you, in the course of your official duties, have occasion to have a conversation with Hyman Karp, of the Fall River Bargain Center?

Mr. Coleman: If your Honor please, I desire to object to any evidence and conversation between this witness and Hyman Karp with respect to the defendants Max Schaffer and Norman Schaffer.

The Court: Same objection, Mr. Katz?

Mr. Katz: Yes.

The Court: Same ruling as before.

Mr. Coleman: That is with respect to the entire line of questioning.

The Court: Yes.

Mr. Coleman: Thank you.

A. Yes, I did.

Q. What was the first time you had occasion to have a conversation with Hyman Karp?

A. The first conversation would be on July 28, 1953.

Q. And who was present at that conversation?

A. Mr. Hyman Karp, an agent named Vivian, and myself.

Q. And where did this conversation take place?

A. At 189 North Main Street, at one of the stores of the [fol. 1124] Fall River Bargain Center.

Q. Do you see Mr. Karp in the courtroom today?

A. Yes, I do.

Q. Can you point him out to us, please?

A. The gentleman just about to stand.

Mr. Moran: May the record indicate that the witness identified the defendant Hyman Karp.

Q. Will you tell us what was said during that conversation by Mr. Karp and by yourself?

A. We identified ourselves and told him that as a result of information we had received from our New York office, there was some question—first we asked him, I believe, if he had received goods from a firm known as A. Schafler in New York City, and he said he had. And then I told him as a result of information that we had received there was some question about the goods that he received from A. Schafler, and I wanted to talk to him about it.

And I believe he said he would like to talk to his attorney first, and he called up an attorney in Fall River, and after talking with the attorney, he said he would be glad to talk to us.

[fol. 1125] Then I asked him about the beginning of the Fall River Bargain Center, and he said that he started in business on or about November 17, 1950, when he purchased the store at 189 North Main Street, in Fall River, and called it the Fall River Bargain Center. This was a dry-goods store, handling mostly children's and women's, misses—children's and misses' wear—it was approximately the size of this courtroom. It had two doors at the main entrance.

He said he purchased another store in Fall River at 1320 Pleasant Street, in June of 1951. This was formerly a dry-goods store, and he simply changed the name, I believe, and called that also the Fall River Bargain Center.

He said he handled a low end children's and misses' wear at both stores.

He said he kept his books at the store at 1320 Pleasant Street, and that he was the only one that entered—made entries in the book, in the books, other than a James Kane —that is spelled K-a-n-e—who was a certified public accountant in Fall River.

He said that for a while after starting in business [fol. 1126] as the Fall River Bargain Center he dealt with recognized wholesalers, and about September of 1951 he came to New York City on a buying trip and looked up a fellow named Hy Berk, to whom he had been introduced to some previously by a relative. At that time he didn't say who the relative was, but in a later conversation he said the relative was his sister, I believe, an Ethel Ringel, who lives in New York City.

After talking with Hy Berk at that time, in September 1951, he said he had a salesroom in the 400 block on Seventh Avenue, in New York City, which I believe he said also had an entrance on 33rd Street. He talked with Hy Berk about obtaining goods, and thereafter dealt with Berk from September 1951 to about September or October of 1952.

He said he ceased doing business with Berk because Berk told him that he was either going out of business or becoming associated with a fellow named Sol Eisenberg. He said that he started doing business with Sol Eisenberg about July of 1952, and met Sol Eisenberg through Hy Berk. Eisenberg had a place at 110 West 40th Street, I believe, [fol. 1127] and—incidentally, he said—I asked him about coming to New York to see Berk, and he said he had been to see Berk at Seventh Avenue, about, well, several times, and that Berk had been to his place in Fall River once.

With regard to Eisenberg, he started doing business with Eisenberg in July, and continued to do business with Eisenberg until December 1952.

Eisenberg, he said, had a showroom at 110 West 40th Street, and handled ladies' dresses or ladies' garments. He

continued to do business with Eisenberg until December, and then ceased doing business with Eisenberg because he said Eisenberg decided to handle ladies' dresses exclusively.

Q. Did he say anything concerning the number of times—

Mr. Steinberg: I object. He hasn't exhausted his recollection of conversation yet. Will you tell him to do that, if your Honor please?

The Court: It doesn't matter.

Was that all that was?

The Witness: No, your Honor.

A. (Continuing) He said that he had been to Eisenberg's place, either half a dozen times, or six times, I am [fol. 1128] not sure which, but it was either one or the other.

Q. At 110 West 40th Street?

A. At 110 West 40th Street, and when he ceased doing business in—well, he started doing business next with a firm known as A. Finkel, at 1133 Broadway, New York, and he said he went to 1133 Broadway about six times, or about a half a dozen times, but never met any person by the name of A. Finkel at that address, but did meet Hy Berk there.

He started business with Finkel in September or October of 1952 and continued to do business with Finkel until March of 1953. In March of 1953 he purchased 33 zoot suits from A. Finkel, for which he paid $150, and sold the zoot suits in a lot to a store known as Boyle Bros., in New Bedford, for which—and sold them for $264. In other words, he told me at a later date he bought them for five dollars apiece and sold them for eight dollars to Boyle Bros.

He said that shortly after he sold the zoot suits he received a visit, or received a call from a John Connell, of the Skelly Detective Agency in Fall River, and Mr. Connell [fol. 1129] had told him that the zoot suits that he had sold to Boyle Bros. had been stolen from a, I believe, the Clinton Swan Clothes in New York City, and thereafter he called Finkel's in New York, but couldn't get any answer.

This zoot suit incident, he said, happened in March of 1953.

He then began doing business with A. Schafler, at 48 West 25th Street, New York City. He said that he began doing business with Schafler as a result of a telephone call he received from a man named Tony. I asked about Tony and he said that Tony was a man that he had met at Finkel's place on one occasion, and that Hy Berk introduced this Tony to Mr. Karp. He said that he had forgotten his last name, and that the introduction was made by Berk saying to Mr. Karp at one time, when he was at Finkel's place, "Say hello to Tony." So Mr. Karp knew him by "Tony," or at a later time, he told me he also knew him as "Mr. T," but he didn't recall or didn't know his last name.

He said he had been to Finkel's place about six times, from the time he first started to do business in September, [fol. 1130] October of 1952, up to the zoot suit incident in March of 1953.

I asked to look at his checkbook, I believe at that time, and he showed me that he had written three checks payable to A. Schafler, and only one of the three had cleared at that time. This one check that he showed me was dated June 17, 1953, payable to A. Schafler, in the sum of $670 and some cents. This was endorsed "A. Schafler," and then a second endorsement of one, Charles Santangelo.

I believe at that time he said that he had first started doing business, or at least the first shipment that he received from Schafler was May 22, 1953, and he continued to do business up to the time I interviewed him on July 28th, and he received during that period about 106 cartons from Schafler.

I asked him about any discount that he might receive from Schafler, and he said that his agreement with Schafler was that he would receive a 33⅓ per cent discount on all goods that he received from Schafler.

There might have been other things about that conversation, but I don't recall them at this time.

* * * * * * *

[fol. 1153] Q. Was there any conversation concerning a man by the name of Mr. Schaffer?

A. I asked him if when he went to Finkel's place, if he

ever met anyone else there, and he said he met a Mr. Schaffer and his son from Lebanon, Pennsylvania. * * *

* * * * * * *

[fol. 1344] CHARLES MILLER, recalled, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Moran:

* * * * * * *

[fol. 1349] Q. I direct your attention to these papers here and ask you if you can tell us what these papers are?

A. These are portions of invoices which I recovered from Stracuzza's trash on July 23, 1953, and which I at-[fol. 1350] tempted to piece together with Scotch tape.

* * * * * * *

[fol. 1600] (GOVERNMENT'S REQUESTS TO CHARGE ARE AS FOLLOWS:)

* * * * * * *

[fol. 1602] 2. The indictment charges that each of the defendants transported and caused to be transported in interstate commerce merchandise of value in excess of $5000. In order to sustain a conviction, the Government is not required to establish that any of the defendants personally transported the merchandise alleged to have been stolen.

It is sufficient if you find that each defendant aided and abetted the transportation of the merchandise by Stracuzza and thus caused such to be transported in interstate commerce.

A defendant, if the evidence supports the charge, may be held as a principal under a federal law, generally referred to as the Aiding and Abetting section, which reads:

"Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces [fol. 1603] or procures its commission, is punishable as a principal.

"(b) Whoever wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

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[fol. 1608] REQUEST FOR INSTRUCTIONS TO THE JURY

A.

REQUEST ON BEHALF OF DEFENDANT, MAX SCHAFFER

• • • • • • •

[fol. 1611] 9.

No violation of Section 2314 takes place unless the Government establishes beyond a reasonable doubt that the defendant Max Schaffer transported or caused to be transported merchandise of a value of five thousand dollars ($5,000.), knowing the same to have been stolen and converted. If the jury finds that the shipments from on or about May 15, 1953, up to and including July 27, 1953, from the Southern District of New York to Lebanon, Pennsylvania, were entirely separate and distinct and were not in fact transported or caused to be transported by Max Schaffer, pursuant to a single plan or agreement with A. Schafler, such shipments cannot be grouped for the purpose of establishing the value of five thousand dol-
[fol. 1612] lars ($5,000.), as required by the statute and must find the defendant Max Schaffer not guilty.

10.

In order to group the shipments between on or about May 15, 1953, up to and including July 27, 1953, the jury would have to find beyond a reasonable doubt that the shipments were transported pursuant to a single plan or agreement between Max Schaffer and A. Schafler and thus had unity of purpose.

• • • • • • •

[fol. 1615] B.

REQUEST ON BEHALF OF DEFENDANT, NORMAN SCHAFFER

* * * * * * *

[fol. 1617] 8.

No violation of Section 2314 takes place unless the Government establishes beyond a reasonable doubt that the defendant Norman Schaffer transported or caused to be transported merchandise of a value of five thousand dol-[fol. 1618] lars ($5,000.), knowing the same to have been stolen and converted. If the jury finds that the shipments from on or about May 15, 1953, up to and including July 27, 1953, from the Southern District of New York to Lebanon, Pennsylvania, were entirely separate and distinct and were not in fact transported or caused to be transported by Norman Schaffer pursuant to a single plan or agreement with A. Schafler, such shipments cannot be grouped for the purpose of establishing the value of five thousand dollars ($5,000.), as required by the statute and must find the defendant Norman Schaffer not guilty.

9.

In order to group the shipments between on or about May 15, 1953, up to and including July 27, 1953, the jury would have to find beyond a reasonable doubt that the shipments were transported pursuant to a single plan or agreement between Norman Schaffer and A. Schafler and thus had unity of purpose.

* * * * * * *

[fol. 1675] [File Endorsement Omitted]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ANTHONY STRACUZZA, MARIO STRACUZZA, DOROTHY STRACUZZA, MAX SCHAFFER, NORMAN SCHAFFER, HYMAN KARP and BENJAMIN T. MARCO, Defendants.

AFFIDAVIT IN OPPOSITION—Filed January 20, 1958

* * * * * * *

[fol. 1679] MOTION FOR SEVERANCE

12. The indictments both charge a conspiracy on the part of the defendants to transport stolen merchandise in interstate commerce (C 145-232) and to receive such merchandise (C 145-233). Information available to the Government indicates that the defendants Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco received this merchandise from the Stracuzzas with knowledge that such merchandise was stolen; that the defendants Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco were known to one another. Therefore, if a separate trial is granted at the request of Hyman Karp, it will be necessary for the Government to make a complete duplication of its proof; it must call the same witnesses and introduce the same documents, all of which will cause an unnecessary expense to the United States. The defendant Hyman Karp who is brought to trial after the initial prosecution will be forewarned of all the details of the Government's evidence and will be enabled to tailor his defense based on such information.

Wherefore, your deponent prays that the motion to dismiss the indictments and the motion for a severance

and separate trial made by the defendant Hyman Karp be [fol. 1680] denied.

John T. Moran, Jr.

Sworn to before me this 20th day of January, 1958.

Jack W. Ballen, Notary Public, State of New York, No. 41-0146400, Queens County, Term Expires March 30, 1959.

[fol. 1681]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 160—October Term, 1958.

Argued December 4, 1958

Docket No. 25328

UNITED STATES OF AMERICA, Appellee,

v.

MAX SCHAFFER, NORMAN SCHAFFER, BENJAMIN T. MARCO and HYMAN KARP, Defendants-Appellants,

ANTHONY STRACUZZA, MARIO STRACUZZA and DOROTHY STRACUZZA, Defendants.

OPINION—Decided April 21, 1959

Before Swan, Medina and Waterman, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge*.

Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco appeal from a judgment convicting them of knowingly transporting stolen goods in interstate com-

merce in an amount exceeding $5,000 in violation of 18 U. S. C. Section 2314. No opinion below. Affirmed.

[fol. 1682] John T. Moran, New York, N. Y., Assistant United States Attorney (Arthur H. Christy, United States Attorney and George I. Gordon, Assistant United States Attorney, New York, N. Y., on the brief), for appellee.

Jacob Kossman, Philadelphia, Pa. (Irving W. Coleman, Northampton, Pa., on the brief), for Max Schaffer and Norman Schaffer, defendants-appellants.

Harris B. Steinberg, New York, N. Y., for Hyman Karp and Benjamin T. Marco, defendants-appellants.

Medina, Circuit Judge:

Defendants-appellants Max Schaffer, Norman Schaffer, Benjamin T. Marco, and Hyman Karp were convicted of violating Section 2314 of title 18, United States Code by knowingly transporting stolen merchandise consisting of ladies' and children's wearing apparel of a value in excess of $5,000 in interstate commerce.[1] Appellants were tried together to a jury on two indictments, only the first of which is relevant here. The second indictment, containing a single count charge of conspiracy to violate 18 U. S. C., Section 659, by receiving and concealing goods stolen in interstate commerce, of a value of more than $100, knowing the same to have been stolen was dismissed at the close of the prosecution's case.

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[1] 18 U. S. C. Section 2314 provides:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud • • •

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both • • •"

[fol. 1683] The first indictment is in four counts. Count one charges defendants Max and Norman Schaffer and three other defendants, Anthony (Tony) Stracuzza, Mario Stracuzza and Dorothy Stracuzza, with knowingly transporting stolen merchandise between the Southern District of New York and Lebanon, Pennsylvania; during the period from May 15, 1953 to and including July 27, 1953. Count two charges a similar violation by the Stracuzzas and Marco, the transportation taking place between the Southern District of New York and Bluefield, West Virginia, during the period from June 11, 1953 to and including July 27, 1953. Count three charges a similar offense by the Stracuzzas and Karp, the transportation occurring between the Southern District of New York and Fall River, Massachusetts, during the period from May 21, 1953 to and including July 27, 1953. The fourth count charges the four appellants and the three Stracuzzas with a conspiracy to transport stolen merchandise in interstate commerce during the period from September 1, 1952 to October 20, 1954.

Tony and Mario Stracuzza pleaded guilty prior to trial and the indictment of Dorothy Stracuzza was severed and pending at the time of the trial. At the conclusion of the prosecution's case, which took a little over two weeks to present, each of the appellants rested without calling any witnesses in his behalf. The Court, on motions made by the appellants, dismissed the conspiracy count. The substantive counts went to the jury, the principal issue being whether or not each defendant knew that the goods he received from the Stracuzzas was stolen. Each defendant was found guilty of the substantive charge made against him. The two Schaffers and Karp were each sentenced to two years imprisonment, and each was fined $10,000. Marco received a sentence of four years imprisonment and a fine of $10,000. All appellants were released on bail pending appeal.

[fol. 1684] The Government proved that each appellant, a retail garment store owner, entered into a standing agreement with Tony Stracuzza by which merchandise was shipped to him at substantial discounts, previously agreed upon. This merchandise was stolen by Mario Stra-

cuzza, Tony's brother and assistant, who induced various truck drivers to turn the goods over to him for a share of the profits. Such practices had been going on for several years and this illegal business had been initially operated by Sol Eisenberg and Hymie Berk. At first acting in a subordinate capacity with Eisenberg and Berk, Tony along with his brother Mario later formed a partnership with Berk in September 1952 and did business under the name A. Finkel. This partnership lasted until March 1953. Each of the appellants did business with Berk and Eisenberg and all but Marco did business with A. Finkel.

In May 1953 Tony and Mario set out on their own and began operations under the name A. Schafler. It is the appellants' dealings with this concern that are the basis of the indictment. Goods were sent to each appellant at rates 55-65% of the original manufacturer's price. According to agreement Tony Stracuzza sent each appellant the original manufacturers' invoices with each shipment. Max and Norman Schaffer visited each of Stracuzza's various establishments on several occasions and they saw both the merchandise and the manufacturers' invoices. Karp also visited all establishments but A. Schafler's and Marco dealt personally with Stracuzza at Berk and Eisenberg's and at A. Schafler's. The wealth of other evidence produced on trial need not be detailed at this point but will be alluded to as it becomes relevant.

Appellants make the following points: (1) that it was error to refuse to dismiss the indictment and to direct a verdict of acquittal in favor of each appellant on the ground that the aggregation of the value of various ship-
[fol. 1685] ments was permitted despite the fact that no single shipment to any appellant was of a value of $5,000;[2] (2) that it was error to submit any of the substantive charges to the jury in view of the dismissal of the conspiracy count, due to the prejudicial effect on each appellant of the evidence admitted in support of the conspiracy

[2] Appellants Karp and Marco also claim that it was error with respect to them to submit the substantive charges against them to the jury because of the alleged absence of proof that the merchandise sold to them was stolen.

count and the evidence received against each of the other appellants in support of the substantive charges; and (3) that it was error to refuse to direct a mistrial because of allegedly prejudicial and improper comments made by the prosecutor in his summation to the jury.

We shall discuss these contentions *seriatim*, but find no merit in any of them.

The Propriety of Aggregating Shipments

It is conceded that no shipment to any appellant was worth as much as $5,000. On the other hand, it is agreed that if shipments may be aggregated, the statutory requisite is far exceeded.[3] The judicial authority on this point is rather meager and we think with good reason.[4] For the answer has been spelled out in no uncertain terms in the statute and in the legislative history.

Section 2311 of title 18, U. S. C. furnishes the basic definitions used in the chapter on stolen property which includes sections 2311 through 2317. It is there provided:

> [fol. 1686] "'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

That the statute means precisely what it says is shown by the following excerpts from the relevant Congressional reports:

H. R. Rep. 1462, 73d Cong., 2d sess., p. 2 (1934)—

> "As reported by your committee, the jurisdiction of the Federal Government is limited to cases in which the value of the stolen property is $5,000 or more, except in cases of pledging or accepting in pledge

[3] The evidence indicates that the goods purchased and transported by the Schaffers were worth wholesale $19,531.52; by Karp, $17,175.24; by Marco, $23,080.14.

[4] See *Andrews* v. *United States*, 4 Cir., 1939, 108 F. 2d 511; cf. *United States* v. *Segelman*, W. D. Pa., 1949, 86 F. Supp. 114.

such property for a loan in which case the minimum is set at $500. *There is added a provision which authorizes Federal jurisdiction in the case of a series of transactions* involving property of a total value of $5,000 or more." (Emphasis added.)

The reason for the $5,000 limitation is given in this same report. It continues:

"It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General."

H. R. Rep. 1599 (Conference Report), 73d Cong., 2d sess., p. 3 (1934) contains the following:

[fol. 1687] "The second amendment of the House added, also, a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more. The Senate agreed to the amendment."

H. R. Rep. 422, 76th Cong., 1st sess., pp. 1-2 (1939)—(in amending the Stolen Property Law) reads:

"It is to be noted, in this connection, that under the terms of section 5 of the Act in the event the defendant is charged with a series of violations, the aggregate value of the property referred to in the indictment may be taken to make up the minimum valuation."

As the "series of transactions" between the Stracuzzas and each appellant related to stolen merchandise of "the aggregate value" of more than $5,000, the case clearly meets the statutory test.

Appellants appear to contend that each of the shipments was separate and distinct from the others as they cite

Andrews v. *United States*, 4 Cir., 1939, 108 F. 2d 511, a case where transactions involving values less than $5,000 were aggregated, as the conspiracy established in that case "gave them unity for the purpose of the statute." By way of dictum (p. 514) it was said that "transactions which are entirely separate and distinct cannot be grouped for the purpose of establishing a value within the statute." We need not now decide what ruling should be made in a case where the transactions are truly "separate and distinct." Much may depend upon the facts of a particular case. Here, however, it is perfectly clear that the shipments with respect to each appellant were not "separate and distinct." Although the overall conspiracy between the Stracuzzas and the four appellants was not established, [fol. 1688] the proofs disclose as to each appellant a sufficient "unity for the purpose of the statute." All goods acquired by each appellant were acquired from the same distributor, Tony Stracuzza; all goods were acquired at the same discount according to a pre-arranged agreement; all shipments included within the indictment as to each appellant were concentrated within a specified time of no more than two and one-half months; each shipment had the same origin and destination; the merchandise shipped was all of the same type, ladies' and children's wear; and each appellant in negotiating with the Stracuzzas contemplated a number of transactions.

Appellants admit that the Congress seems to have intended to permit aggregating shipments to meet the $5,000 requirement. But they urge that such a construction might make acts which were "innocent when done" criminal upon the occurrence of subsequent events, i.e. other acts of a similar nature. Such retrospective criminality is then likened to the doctrine of trespass *ab initio*, a doctrine repeatedly repudiated by the Supreme Court. *McGuire* v. *United States*, 1927, 273 U. S. 95, 98-99; *Zap* v. *United States*, 1946, 328 U. S. 624, 629; *On Lee* v. *United States*, 1952, 343 U. S. 747, 751-52.

There is no merit whatever in this contention. Nor are we able to perceive how the transportation of stolen goods knowing them to have been stolen could be regarded as

"innocent when done," regardless of the amount involved. The only reason for the $5,000 limitation is to avoid overtaxing the Department of Justice. There is no legitimate interest of appellants which the Congress sought to protect by this requirement. Hence it is perfectly rational to consider past acts in determining whether any appellant's conduct is important enough to warrant prosecution by the Department of Justice.

[fol. 1689] Finally, the Supreme Court's rejection of the doctrine of trespass *ab initio* is both irrelevant and cited out of context. In the cases cited *supra* the Court was faced with the problem of whether or not the Government could use evidence lawfully obtained after a lawful entry if, subsequent to the lawful entry, the agents who obtained the evidence committed unlawful acts unconnected with the obtaining of the evidence sought to be introduced. In each instance the Court held that the Constitution did not prevent the Government from using the evidence and that the subsequent unlawful acts did not affect the entry so as to "taint" the evidence. The policy considerations underlying the doctrine of trespass *ab initio*, i.e., to punish tortfeasors and to aid their victims, were found inapplicable to the situations there presented. In the case before us there is no "innocent" act being "tainted" by subsequent occurrences; there is no legitimate interest of appellants worthy of protection; and the Congress has a very definite stake in curbing such socially undesirable conduct. Hence we conclude there is no reason for construing the clear mandate of the Congress in any way other than that which was intended.

Appellants Karp and Marco claim that the $5,000 requirement of the statute was not met as they say there was no proof that any particular merchandise purchased by them was stolen. Indeed, they appear to assert that as Mario Stracuzza was the man who induced the truck drivers to steal the original packages and sell them to him, and as Mario did not testify, the whole case collapsed. We think it clear beyond peradventure of doubt on this record that as testified by Tony Stracuzza, all the merchandise he dealt with as "distributor" was stolen merchandise. The collation of the various proofs of this fact

vis-a-vis appellants Karp and Marco would be a work of supererogation.

[fol. 1690] *Were Appellants Prejudiced by the Joint Trial*

Were it not for the conspiracy count, it would have been clearly erroneous to try the appellants together under Rule 8(b), Fed. R. Crim. P.[5] For there would be no common participation "in the same act or transaction constituting an offense" which is a requisite to joinder. See *Kotteakos* v. *United States*, 1946, 328 U. S. 750; *McElroy* v. *United States*, 1896, 164 U. S. 76; *Brooks* v. *United States*, 5 Cir., 1947, 164 F. 2d 142. However, the allegation of a conspiracy count meets the requirements of Rule 8(b) and hence at the outset the joinder was proper and within the discretion of the trial court. *United States* v. *Ball*, 1896, 163 U. S. 662; *United States* v. *Lebron*, 2 Cir., 1955, 222 F. 2d 531, cert. denied, 350 U. S. 876; *United States* v. *Cohen*, 2 Cir., 1941, 124 F. 2d 164, 165, cert. denied *sub nom. United States* v. *Bernstein*, 315 U. S. 811. Moreover, it is not claimed, nor could it be with any show of reason, that the conspiracy count was alleged by the prosecution in bad faith.

Accordingly, as provided in Rule 14, Fed. R. Crim. P.,[6] we must determine on this appeal whether appellants, or any of them, were prejudiced by the joinder. *Berger* v. [fol. 1691] *United States*, 1935, 295 U. S. 78; *United States* v. *Chieppa*, 2 Cir., 1957, 241 F. 2d 635, cert. denied *sub nom.*

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[5] Rule 8(b) provides:

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

[6] Rule 14 which provides:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

Ivicola v. *United States*, 353 U. S. 973; *Monroe* v. *United States*, D. C. Cir., 1956, 234 F. 2d 49, cert. denied, 352 U. S. 873. The mere fact that the conspiracy count is dismissed at the close of the evidence by the trial judge, or that a verdict of acquittal on that count is returned by the jury, does not establish as matter of law that it was error to submit the substantive charges to the jury.

Appellants assert they were prejudiced by the joinder on two levels, general and specific. The Schaffers are content to claim that the mere idea of receiving individual treatment in a case that took over two weeks to try, involved hundreds of exhibits, numerous witnesses, and four separate defendants is so far-fetched that prejudice must be deemed to result as a matter of law. See *Kotteakos* v. *United States*, *supra*, 328 U. S. 750.

This contention is belied by the record which reveals several precautionary measures taken to assure defendants of a fair trial and indicates no reason whatever why the jury should have been confused. First, each defendant was represented by a separate attorney except that Max and Norman Schaffer had one common counsel. Secondly, with virtually every offer of proof, testimony or exhibit, an instruction was requested and obtained that proof admitted with respect to one defendant was not to be considered with respect to any other defendant. Over fifty such requests and instructions were given. Third, the witnesses were called in orderly fashion so that each group of witnesses focused on a separate defendant. This practice was uniformly observed throughout the trial with but one minor exception. Finally, the Court's charge—admitted to be fair even by appellants' attorneys—carefully reviewed the evidence pro and con with respect to each defendant. And a clear direct admonition was given to [fol. 1692] keep the three distinct charges separate and not to consider evidence bearing on one defendant against another. Thus it is plain upon the face of the transcript of the testimony that throughout the trial Judge Murphy was scrupulously careful to protect the rights of each of the defendants and to make sure that none of them suffered prejudice from the joinder.

Moreover; there was nothing intrinsically complex about either the nature of the case, or of any testimony or exhibit, nor were the instructions of Judge Murphy to the jury in the slightest degree confusing or ambiguous. We have no problem of evidence admitted against one appellant which incidentally implicates another. There was only one witness common to all defendants, Tony Stracuzza, and he gave his testimony in orderly fashion describing his business and then his relationship and his transactions with each defendant in turn. Each defendant lived in a different part of the East, except the two Schaffers who operated their store together; and there is nothing in the record to indicate that any one of them knew of Stracuzza's dealings with the others.

In the face of cautionary instructions from the trial judge, far greater possibilities of confusion have been tolerated on the premise that the jury can and will do as it is told. See *Delli Paoli* v. *United States*, 1957, 352 U. S. 232; *Opper* v. *United States*, 1954, 348 U. S. 84; *Blumenthal* v. *United States*, 1947, 332 U. S. 539; *Berger* v. *United States*, 1935, 295 U. S. 78; *United States* v. *Bando*, 2 Cir., 1957, 244 F. 2d 833; *United States* v. *Chieppa*, *supra*, 2 Cir., 1957, 241 F. 2d 635, cert. denied, *sub nom. Ivicola* v. *United States*, 353 U. S. 973; *United States* v. *Lebron*, 2 Cir., 1955, 222 F. 2d 531, cert. denied, 350 U. S. 876; *United States* v. *Leviton*, 2 Cir., 1951, 193 F. 2d 848, cert. denied, 343 U. S. 946; *Nash* v. *United States*, 2 Cir., 1932, 54 F. 2d 1006, cert. denied, 285 U. S. 556; *Robinson* v. *United States*, [fol. 1693] D. C. Cir., 1954, 210 F. 2d 29; *Dunaway* v. *United States*, D. C. Cir., 1953, 205 F. 2d 23.

The case here is a far cry from the state of affairs disclosed in *Kotteakos* v. *United States*, *supra*, 328 U. S. 750. There 32 defendants were listed in the indictment and 19 were brought to trial. While one huge conspiracy was charged, there was testimony concerning eight separate conspiracies, and the trial court had not only not cautioned the jury about the possibility of many conspiracies and the need to consider the evidence as to each separately, but it instructed the jury that it might consider the overt acts of one conspiracy as proof of the guilt of other conspirators,

whether in the same conspiracy or not. Here we have but four defendants whose individually was carefully observed and protected by both the trial judge and the prosecutor, and a state of proof that we think demonstrates that the evidence adduced against each separate defendant could readily be considered as applicable to him alone.

Appellants Karp and Marco press the point further. They assert that some evidence was received which was admissible only for purposes of establishing the conspiracy and they suggest a few specific instances of evidence received against one defendant, subject to connection as to the others, which is claimed to have been prejudicial. None of these assertions of prejudice will bear analysis.

First, it is claimed that the testimony of Tony Stracuzza to the effect that each of the appellants had purchased stolen goods from Stracuzza's former employers, Berk and Eisenberg, during a six-month period prior to the date of the conspiracy charged in the indictment related only to establishing the conspiracy. However, it is well established that where criminal intent is an essential element of the crime charged, prior instances of a similar pattern of operation are relevant to establish scienter. See 2 Wigmore, Evidence, Section 325 (3d Ed. 1940); [fol. 1694] *United States* v. *Brand*, 2 Cir., 1935, 79 F. 2d 605, cert. denied, 1936, 296 U. S. 655. The proof as to these prior dealings showed the same use of manufacturers' invoices and the same substantial discounts from the manufacturers' wholesale prices as did the evidence concerning the transactions alleged in the indictment.

On the day of Stracuzza's arrest, the F. B. I. found in Stracuzza's office a number of original manufacturers' invoices and a sealed carton of merchandise addressed to Karp which contained such invoices. These exhibits were admitted into evidence, and appellants Karp and Marco assert only for the purpose of proving the conspiracy. However, it is apparent that such evidence was admissible substantively against all defendants since it tended to corroborate Stracuzza's allegedly "tainted" testimony concerning his practice of regularly including the manufacturers' invoices in his shipments.

Both Marco and Max Schaffer gave signed statements to the F. B. I. which were quite damaging to their cases, Marco's because it admitted contact with Eisenberg, Schaffer's because it was falsely exculpatory. However, in each instance the Court instructed the jury to consider the exhibit only against the defendant against whom it was offered and later repeated this admonition when the conspiracy count fell through.

Similarly, what were claimed to be humorous remarks by Marco to the effect that the goods were stolen, testimony of an employee of Marco concerning the removal of labels from A. Schafler merchandise and the insertion of new ones, an F. B. I. motion picture of Max Schaffer leaving Stracuzza's office on July 28, 1953, the day of Stracuzza's arrest, and testimony of Karp's dealing in stolen zoot suits were all accompanied by appropriate limiting instructions by the Court.

[fol. 1695] But when these items of proof are broken down, as they were in the summations to the jury, it is clear that each item is of such a character as to affect only the person involved. For example Max Schaffer alone was depicted in the motion picture showing him inspecting merchandise and documents, claimed by the prosecution to be manufacturers' invoices, in Stracuzza's show-room; and he is the very man who, shortly after the taking of the motion picture, told the F. B. I. men that he had never been in the place. So it was with reference to Karp's dealings with the stolen zoot suits, and his telephone conversation with Stracuzza about protection. In view of the repeated instructions on the point, no member of the jury could have supposed that these fragments of the prosecution's evidence affected any other defendant than the one involved in the particular matter testified to.

At best appellants' claims of prejudice come down to a complaint about the guilty "atmosphere" built up by associating each with others so obviously guilty, and the fact that a "tainted" witness was buttressed by the independent proof relating to all defendants, instead of that relating to one alone. Of course, the fact that each appellant makes these claims somewhat weakens their force. But in the absence of any bad faith on the part of the government in

bringing the conspiracy count, the repeated interim instructions and the charge of the Court protecting each defendant's individuality have been traditionally considered as sufficient safeguards for those accused of crime. We conclude that none of the defendants suffered prejudice from the joinder.

There was more than ample proof to sustain a finding that each defendant knew the goods he was buying from Stracuzza were stolen, and that is all there is to the case. The attack on Stracuzza's credibility was a formidable [fol. 1696] one, amply justified by this record; but his credibility was a question solely for the jury to determine.

The Propriety of the Prosecutor's Summation

During the course of their summation appellants sought to discredit the testimony of Tony Stracuzza by alluding to the Government's alleged breach of duty by its failure to call either Mario or Dorothy Stracuzza to corroborate his story. After pointing out that Mario's testimony would only be cumulative, that Dorothy's indictment was still pending, and that the defendants could have called them to the stand themselves had they wanted to, the prosecutor made the following comments.

> "Now in making these comments as to the conduct of the prosecution, there was some criticism as to the extent that the Government failed in its obligations to its citizens to bring out all the facts. I say to you as an assistant United States Attorney, my job is not to convict people, but is to bring them here in court, give them a fair chance to meet the charges that the Government has presented against them.
>
> The motto on the building of the Department of Justice in Washington I think fairly indicates the attitude of the Government, as far as citizens are concerned. It reads:
>
> 'The Government wins when justice is done its citizens in the court.'
>
> Now, of course, if you believe that the Government has in some way or other prevented you from getting

the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march right into that jury-room and acquit every one of these defendants."

[fol. 1697] Far from inserting the prosecutor's personal integrity into the case, these extracts demonstrate a commendable candor and sense of fair play by the Government in permitting the jury to draw inferences from the evidence or lack thereof. Thus calling attention to the duties of a prosecutor did not constitute any representation of the prosecutor's integrity. It was no more than a legitimate and proper answer to an argument advanced in the summation of appellants' counsel. Moreover, the trial judge later properly instructed the jury that no unfavorable inference could be drawn as to Stracuzza's testimony from the Government's failure to call other witnesses in view of the fact that these witnesses were equally available to the de[illegible]e.

Affirmed.

[fol. 1698]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Harold R. Medina, Hon. Sterry R. Waterman, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

MAX SCHAFFER, NORMAN SCHAFFER, HYMAN KARP and BENJAMIN T. MARCO, Defendants-Appellants.

JUDGMENT—April 21, 1959

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro, Clerk.

[fol. 1699a]

Petition of Hyman Karp and Benjamin T. Marco for Rehearing or Stay of Mandate and Continuance of Bail and Stay of Collection of Fine Covering 9 Pages Filed May 11, 1959 Omitted From This Print. It Was Denied, and Nothing More by Order May 18, 1959.

[fol. 1699b]

Petition for Rehearing on Behalf of Appellants Max Schaffer and Norman Schaffer; and, Alternatively, Motion to Stay Issuance of Mandate and to Continue Bail Covering 22 Pages Filed May 4, 1959 Omitted From This Print. It Was Denied and Nothing More by Order May 18, 1959.

[fol. 1700]

In United States Court of Appeals
Second Circuit

Present: Hon. Thomas W. Swan, Hon. Harold R. Medina, Hon. Sterry R. Waterman, Circuit Judges.

United States of America, Plaintiff-Appellee,

v.

Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco, Defendants-Appellants.

Order Denying Rehearing—May 18, 1959

A petition for rehearing having been filed herein by counsel for the appellants Hyman Karp and Benjamin

T. Marco together with a motion to stay the issuance of the mandate and to continue bail and to stay collection of fines pending application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Further ordered that the motion to stay the issuance of the mandate and to continue bail and to stay collection of fines pending said application be and it hereby is granted.

A. Daniel Fusaro, Clerk.

[fol. 1702]

In United States Court of Appeals
Second Circuit

Present: Hon. Thomas W. Swan, Hon. Harold R. Medina, Hon. Sterry R. Waterman, Circuit Judges.

United States of America, Plaintiff-Appellee,

v.

Max Schaffer, Norman Schaffer, Benjamin T. Marco, Hyman Karp, Defendants-Appellants,

Anthony Stracuzza, Mario Stracuzza, Dorothy Stracuzza, Defendants.

Order Denying Rehearing—May 18, 1959

A petition for rehearing having been filed herein by counsel for the appellants Max Schaffer and Norman Schaffer together with a motion to stay the issuance of mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Further ordered that the motion to stay the issuance of the mandate and to continue bail pending said application be and it hereby is granted.

A. Daniel Fusaro, Clerk.

[fol. 1703] [File endorsement omitted]

[fol. 1704] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1705]

SUPREME COURT OF THE UNITED STATES

No. 111—October Term, 1959

MAX SCHAFFER and NORMAN SCHAFFER, Petitioners,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and one and one half hours are allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 1706]

SUPREME COURT OF THE UNITED STATES

No. 122—October Term, 1959

HYMAN KARP and BENJAMIN T. MARCO, Petitioners,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and one and one half hours are allowed for oral argument. The case is set for argument immediately following No. 111.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
FILED
JUN 11 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. [redacted] 111

MAX SCHAFFER and NORMAN SCHAFFER,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

No.

MAX SCHAFFER AND NORMAN SCHAFFER,
Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAX SCHAFFER and NORMAN SCHAFFER, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on April 21, 1959.

OPINION BELOW.

The opinion of the court below (Appendix A, *infra*, pp. A1-A16) has not yet been reported.

JURISDICTION.

The judgment of the court below (Appendix B, *infra*, p. A17), was entered on April 21, 1959. A petition for rehearing was denied on May 18, 1959 (Appendix C, *infra*, p. A18). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Rule 8(b) of the Federal Rules of Criminal Procedure recognizes and reflects the fundamental right of a criminal defendant to be tried alone and the justified opprobrium attaching to the mass trial. After a conspiracy count against several defendants is dismissed for lack of evidence, is it proper to continue a joint trial and to submit to a single jury the remaining counts, charging each defendant with an independent and unrelated offense?

2. Where the District Court has plainly refused to submit an issue of fact to the jury for its determination, can the Court of Appeals properly affirm a conviction by reviewing the evidence and making a finding on that issue of fact adversely to the defendants?

3. The National Stolen Property Act makes certain interstate transportation a federal crime if the goods exceed $5,000 in value. Can this statute be interpreted to permit a conviction where the value element of the offense is established by adding together the values of several separate and distinct transactions, no one of which constituted a federal offense since the goods involved were valued at less than $5,000?

STATUTES AND RULES INVOLVED.

1. Section 2311 of Title 18, U. S. Code, provides in pertinent part as follows:

> *§ 2311. Definitions*
>
> As used in this chapter:
>
> • • • • •
>
> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

2. Section 2314 of Title 18, U. S. Code, as amended, provides:

> *§ 2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting*
>
> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, know-

ing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

3. The Federal Rules of Criminal Procedure are as follows:

Rule 8. Joinder of Offenses and of Defendants

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT OF THE CASE.

Petitioners, father and son, were partners in a women's clothing store in Lebanon, Pennsylvania. In the course of several months in 1953, they made periodic purchases of merchandise in New York City. Petitioners were indicted and convicted for transporting in interstate commerce wearing apparel of a value in excess of $5,000, knowing that it had been stolen, in violation of 18 U. S. C. § 2314.

Petitioners were brought to trial with two other persons, Marco and Karp, who had been indicted for similar offenses. Neither of the additional defendants had any relationship whatsoever with the petitioners. Nor were they connected with each other in any way. Marco had purchased goods to be sent to Bluefield, West Virginia. Karp had ordered goods shipped to Fall River, Massachusetts. In each of the three cases, the buyers from Pennsylvania, West Virginia and Massachusetts purchased some of the goods used in their respective stores from the same supplier in New York, who had other customers in addition to the petitioners and the two defendants.

A single indictment had been drawn for the three separate offenses in four counts. Count One charged the petitioners and the suppliers with violating 18 U. S. C. § 2314. Counts Two and Three made similar accusations against Marco and Karp, together with the suppliers. All three were tried simultaneously in a single trial and convicted.

The basis for this manifestly improper joinder of unrelated prosecutions was a fourth count in the common indictment. This charged that the petitioners, together with Marco and Karp and the suppliers, had conspired to violate 18 U. S. C. § 2314 by causing stolen goods to be transported in interstate commerce. The inclusion of this conspiracy count made possible a common trial which would otherwise have been a clear violation of Rule 8(b) of the Federal Rules of Criminal Procedure.

Prior to the trial, the three persons implicated as the suppliers were removed from the case. Two of them entered pleas of guilty (2a).[1] The charges were dismissed as to the third (4a). As tried, the case involved only the three sets of completely unrelated buyers.

The connecting link of the conspiracy charge was quickly eliminated from the case. The prosecution was unable to present even a *prima facie* case of conspiracy.[2] In the words of the trial judge, the Government did not "come anywheres close to the standard that [it had] to prove, either as to whether or not there were three separate conspiracies or just a general conspiracy" (12a). The trial judge, essentially of his own motion, ordered the conspiracy charge dismissed at the close of the prosecution's evidence (11a). The Government failed to show that the several defendants even knew each other, much less than they had conspired together. Despite objections that it would be prejudicial to the defendants to continue the trial on the substantive counts only (13a-14a),[3] the trial judge ordered the case to go forward as a joint trial.

It was stipulated by the Government and the defense (20a-21a) that no single shipment of goods to the petitioners was of a value of $5,000, that each shipment to the petitioners was of a value less than that sum, but that the total value of all the shipments made to them during the period alleged in the indictment exceeded $5,000.[4] Petitioners contended that the aggregation of these amounts was im-

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1. References to figures with the suffix "a" are to the printed Appendix filed by these petitioners. References to the filed but unprinted notes of testimony are prefixed by "Tr."

2. At the same time, the District Judge likewise dismissed a second indictment which charged petitioners, the suppliers and Marco and Karp with conspiring to violate 18 U. S. C. § 659. This indictment does not affect any of the issues in the case.

3. While the cited objection was made orally only by counsel for Karp, it had earlier been agreed, with the concurrence of the trial judge, that any objection taken on behalf of any defendant would inure to the benefit of all the defendants (10a-11a).

proper unless the prosecution proved that they had been made pursuant to a single plan or agreement so that the shipments thus had unity of purpose.

Jury instructions were submitted to the court by petitioners embodying this theory (Tr. 1611-1612, 1617-1618). The trial judge (Murphy, D. J.) refused to charge the jury on that issue. In a colloquy with counsel, he said:

> "What I have in mind, although I don't want to cut you off, is to give the case to the jury on the three substantive counts, and tell them that they have to find the value—and I suppose they will almost have to find it pursuant to the stipulation—that the aggregate value is over five, and you have to take exception to that part of the charge, and see what the jury does, and then we consider it again, because I am not too clear what the definition in 2311 really means. . . . I will charge it the way you want me to, Mr. Moran [Assistant U. S. Attorney]" (16a).

The instructions referred to the stipulation of the attorneys as establishing that the total value of shipments in each count exceeded $5,000. The jury was told to "rely" on that stipulation, even though no individual shipment was of a $5,000 value (58a).[5] Exception was duly made to the failure of the judge to give the instructions requested by the petitioners (63a).

Petitioners were convicted and sentenced to two years' confinement and to pay a fine of $10,000, following a verdict of guilty by the jury (69a).

The Court of Appeals for the Second Circuit (Swan, Medina, Waterman, JJ.) affirmed. The opinion by Judge

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4. A similar stipulation was made as to the other defendants, Marco and Karp (Tr. 1438-1441).

5. This was in accordance with the requested charge submitted by the Government which made no mention of conspiracy or agreement or course of conduct on aggregating the value of the several shipments. See Govt. Request No. 2 (Tr. 1602-1603).

Medina presents two grounds for the decision, both of which are necessary to support the judgment.

First, it was held that no decision is necessary on whether aggregation of the value of shipments is proper where they are separate and distinct, since the facts in this case are "perfectly clear" that the shipments to the petitioners were made according to a pre-arranged agreement.

Second, the court held that joinder of the independent prosecutions was proper, although ". . . it would have been clearly erroneous to try appellants together" in the absence of the conspiracy count. In the opinion of the court, error would have been committed only if the petitioners could demonstrate either that the conspiracy device had been used by the prosecution in bad faith or that the joinder led to more prejudice to the defendants than the court could perceive in the record.

In a petition for rehearing, petitioners contended that the first holding of the Court of Appeals is untenable. It rests upon a finding of fact by the appellate court rather than by the jury, clearly reversible error in light of *Grunewald v. United States*, 353 U. S. 391. The error here is compounded by the fact that the finding made by the Court of Appeals is on the precise issue which petitioners requested to have submitted to the jury and on which the District Court refused to charge. Rehearing was denied.

REASONS FOR GRANTING THE WRIT.

Rarely does a single case present three questions so plainly calling for review as does the present one:

First, the guilt or innocence of three unrelated sets of defendants was simultaneously tried in a mass trial, solely because the prosecutor included in the common indictment a count bracketing all the defendants with a conspiracy charge, so lacking in evidentiary support that the charge was dismissed at the close of the Government's case. We ask whether the deprivation of the substantial rights of the defendants to have separate determinations of their culpability and the violation of Rule 8(b) of the Federal Rules of Criminal Procedure can be upheld on so inadequate a pretext.

Second, the Court of Appeals sustained the conviction of these petitioners by themselves finding a crucial fact, in the face of the District Court's refusal of petitioners' request to permit the jury to resolve that precise factual issue. This disregard of so basic a principle of administration of federal criminal justice by the court below, so recently reversed here on the precise point, demonstrates the continuing necessity for supervision by this Court to insure the fairness of criminal processes.

Third, the question avoided by the Court of Appeals, through its "fact-finding," is the important question of the scope of the National Stolen Property Act (18 U. S. C., chapter 113). The statute defines the federal offense in terms of a monetary minimum of the value of the goods concerned and provides, further, for an aggregation of the values of several violations under some circumstances. The issue presented here is whether such aggregation is permissible, under the statute, in every and all circumstance, or whether it is proper only when the several transactions are connected by some general plan or agreement. A determination of the reach of a federal criminal statute as-

surely is of sufficient public importance to warrant review by certiorari.

First. The basic issue presented by this case concerns the proper limitations upon the use of a conspiracy charge to deprive persons accused of crime of their fundamental right to be free of mass trials. We ask that the case be brought to this Court for review because, in the words of Mr. Justice Frankfurter, it was tried ". . . in a way that raised an important question in the administration of federal criminal justice." *Bollenbach v. United States*, 326 U. S. 607.

The question is posed cleanly and sharply. As submitted to the jury the case involved only three totally unrelated substantive offenses. This joinder of independent causes, standing alone, was clear error, and the Court of Appeals so conceded. Not only would it violate Rule 8(b) of the Federal Rules of Criminal Procedure, but it would force each defendant to have his innocence or guilt decided in a mass trial, simultaneously with the determination of other unconnected cases.

The supposed justification for this manifestely erroneous procedure was the inclusion in the common indictment of a count charging all of the defendants with having engaged in a single conspiracy. The Assistant United States Attorney, opposing a pre-trial motion to sever, submitted an affidavit (filed with Record) that the Government had information that all the defendants were known to one another. The Court of Appeals, however, said that the entire record failed to disclose one shred of evidence that any of the defendants had the slightest knowledge of the existence of the others. The District Judge made the most descriptive remark of all. He declared that the Government had failed to "come anywheres close to the standard" of proof necessary to get to a jury (12a). Accordingly, he dismissed the conspiracy count at the close of the Government's case (12a).

The question comes down to whether the Government can claim the benefit of improper joinder of defendants by the simple stratagem of bracketing them with a conspiracy charge so flimsy that it fell far short of even getting to a jury. The Government should not have the windfall of prejudicial and inadmissible testimony against each defendant because of an unfounded charge of conspiracy.

It hardly needs elaboration that this type of issue is one which the Court has itself recognized as worthy of certiorari on many occasions. In *Grunewald v. United States*, 353 U. S. 391, 404, Mr. Justice Harlan wrote: "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not again be detailed." He cited, as illustrative cases, *Delli Paoli v. United States*, 352 U. S. 232; *Lutwak v. United States*, 344 U. S. 604; *Krulewitch v. United States*, 336 U. S. 440; and *Bollenbach v. United States*, 326 U. S. 607.

This case represents further drift in "the long evolution of that elastic, sprawling and pervasive offense"[6] of conspiracy. The decision below is wholly without precedent. The Court of Appeals cited 11 cases to support its conclusion (pp. A11-A12, *infra*). *Not one is on point.*[7] Each involved a situation where the conspiracy count was sub-

6. Jackson, J., in *Krulewitch v. United States*, 336 U. S. 440, 445.

7. Such decisions as there are on so plain a principle are, understandably enough, contrary to the position of the Court of Appeals. See *United States v. Welsh*, 15 F. R. D. 189, 190 (D. D. C.): ". . . different unconnected offenses not arising out of the same series of transactions may not be joined in an indictment in which two or more defendants are charged. There is a good reason for that restriction. This is no technical limitation. The purpose is to prevent mass trials."

See also *Coco v. United States*, 289 Fed. 22 (C. A. 8); *United States v. Geare*, 293 Fed. 997 (App. D. C.); *United States v. Harvick*, 153 F. Supp. 696 (D. N. Dak.); *cf. United States v. Dietrich*, 126 Fed. 664, 670 (D. Neb.).

mitted to a jury,[8] or where the several defendants were jointly charged in at least one of the substantive counts,[9] or where a single defendant was tried on several indictments, each of which charged similar offenses.[10]

In every one of the cited cases, there was still a proper basis for joinder of the multiple charges when the case was submitted to the jury. In this case, however, the sole basis for joinder of the defendants into a mass trial was *eliminated* at the close of the Government's evidence.

Petitioners contended below first that the continuation of the joint trial after dismissal of the conspiracy count constituted error as a matter of law. It is axiomatic that a defendant, who is denied the right to a trial unprejudiced by the simultaneous trial of unrelated defendants, has indeed been grievously injured.[11] Deprivation of such a substantial right cannot here be justified. All that was necessary to protect petitioners was a severance of the trial when the conspiracy count was dismissed. The slight inconvenience to the prosecution in such a procedure does not even approach the importance of the rights of the defendants. We maintain therefore that the courts below committed error as a matter of law.

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8. *Delli Paoli v. United States*, 352 U. S. 232; *Opper v. United States*, 348 U. S. 84; *Blumenthal v. United States*, 332 U. S. 539; *Berger v. United States*, 295 U. S. 78; *United States v. Bando*, 244 F. 2d 833 (C. A. 2); *United States v. Chieppa*, 241 F. 2d 635 (C. A. 2); *United States v. Lebron*, 222 F. 2d 531 (C. A. 2); *United States v. Nash*, 54 F. 2d 1006 (C. A., 2). (See the same case below, 51 F. 2d 253 (S. D. N. Y.), for more details.)

9. *United States v. Leviton*, 193 F. 2d 848 (C. A. 2); *Robinson v. United States*, 210 F. 2d 29 (D. C. Cir.).

10. *Dunaway v. United States*, 205 F. 2d 23 (D. C. Cir.).

11. More than half a century ago, this Court said in *McElroy v. United States*, 164 U. S. 76, 81, that "joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transactions and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

Petitioners also contended that there was specific prejudice in the record of this case. The Court of Appeals relied principally upon the repeated admonitions of the trial judge as proof of the lack of such prejudice. More than fifty cautionary instructions were gleaned from the record by the court of appeals own count (p. A11, *infra*). There is a wry paradox in this reasoning. The mere fact that so many instructions were necessary is itself the best evidence of the oppression to the petitioners.

Time and again, eminent authorities, familiar with the trial courtroom, have announced the impossibility of the mental gymnastics demanded from the jury by this type of instructions. Judge Learned Hand said it is "beyond their powers, or anyone else's." *Nash v. United States*, 54 F. 2d 1006, 1007. Mr. Justice Frankfurter, in *Delli Paoli v. United States*, 352 U. S. 232, 246, 247, said that too often admonition against misuse of testimony ". . . is intrinsically ineffective in that the effect of such nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words . . ."[12]

On some occasions and for some purposes, the courts have permitted the formality of cautionary instructions to conceal their ineffectuality. Where protection of the defendants would require abolition of conspiracy as a crime, for example, the courts have reluctantly accepted the fiction of the effectiveness of the instructions to permit the continued existence *vel non* of the offense of conspiracy.

No such difficult choice is involved in this case. There is absolutely no reason to indulge in the pretension that the jury can carefully compartmentalize in their minds sev-

12. "The statement of facts in the Government's brief is punctuated by eight separate footnotes to explain that the testimony recited in the text was limited to one or another defendant. We doubt that any member of this Court, despite our experience in sifting testimony, can carry in mind what was admitted against whom, and we are confident that the jury could not." Mr. Justice Jackson in *Lutwak v. United States*, 344 U. S. 604, 620, 623.

eral unrelated cases. There is no policy requiring the extension of an unsatisfactory rule beyond the circumstances which gave rise to it.

Numerous other forms of specific prejudice can be pointed up in the record of this case. It is only necessary to read the prosecutor's summation (22a-49a) and the judge's charge (50a-64a) to see how, inescapably, what each defendant was shown to have done bore on what the other defendants were charged with doing.[13]

Petitioners maintain that they have been seriously prejudiced, both as a matter of law and as a matter of fact. They have been improperly joined under Rule 8(b) of the Federal Rules of Criminal Procedure and, under Rule 14, justice requires that the petitioners be afforded separate trials.

This, in bare outline, is the framework of the central issue in this case. Petitioners have been deprived of a fundamental right of a criminal defendant by being compelled to submit to a mass trial under conditions that were clearly erroneous. The procedural gimmick employed to accomplish this result was a conspiracy charge so lacking

13. At one important point in the jury charge, the District Judge lumped together all of the defendants: "For example, *as against all the defendants*, it [*i.e.*, the circumstantial evidence] says that the manufacturers' invoices, which Stracuzza says were included in the shipments, were an obvious indication that the goods were stolen, because of the manner in which they were obliterated or torn; also, that the prices that the defendants paid were so out of proportion to the true market value, and that the copying of the style numbers from the manufacturer's invoice was a further indication.

"It says, as to those defendants who were actually in the premises of Stracuzza, they must have known or at least should have known from the condition of the premises and the manner of the display of the goods that they were not legitimate, but stolen" (55a). (Emphasis added.)

Inasmuch as the supplier had testified that he did not tell any of the defendants that the goods had been stolen (55a), this element of the offense had to be proved circumstantially as to each defendant. The above quotation is the District Court's comment to the jury on that circumstantial evidence. The prejudice in grouping evidence on so personal a question as knowledge is too obvious to need elaboration.

in substance that the trial court dismissed it of his own motion with the remark that it fell far short of even a minimum standard. The implications of the unprecedented decision of the Court of Appeals cut broadly and deeply into the fabric of federal criminal justice. We respectfully submit that the question presented is one on which certiorari should be granted.

Second. Here, as in *Grunewald v. United States*, 353 U. S. 391, reversing *United States v. Grunewald*, 233 F. 2d 556 (C. A. 2), the Second Circuit has sustained a conviction on a factual theory never submitted to or passed upon by the jury. This case actually presents an aggravated instance of the error committed below in *Grunewald*, because here the basis of the Court of Appeals' affirmance was not only not submitted to the jury, but these petitioners' specific requests that the case be tried on that issue were totally denied by the District Judge (16a, 58a).

The instructions to the jury directed them to rely on the stipulation of the attorneys (20a-21a) as establishing the value of the goods for purposes of the definition of the offense (58a). Instructions submitted by the petitioners, which would have charged the jury that they must find the several shipments had been made according to a single plan or agreement before aggregating value, were refused by the trial court (Tr. 1611-1612, 1617-1618).[14] As the colloquy with the judge indicates (15a-17a), he rejected the interpretation of the statute that aggregation of shipments is proper only if made pursuant to a single plan or agreement and thus had unity of purpose.

14. We deem it appropriate to point out that we did not print the rejected instructions in our Appendix in the Court of Appeals. Because of the action of the District Court, the factual question whether the shipments to the petitioners were all pursuant to a single plan or agreement was thought to be out of the case. It was unforeseeable that the appellate court might sustain petitioners' conviction on a factual theory which had not only never been passed by the jury, but which had been withheld from the jury over petitioners' objection. Subsequent to the filing of the opinion below, we did put forward petitioners' rejected instructions in our petition for rehearing.

It is equally clear that the Court of Appeals affirmed the convictions by making *that finding of fact* which the lower court had refused to permit the jury to make. The language in Judge Medina's opinion is unmistakably clear (p. A7, *infra*):

> "We need not now decide what ruling should be made in a case where the transactions are truly 'separate and distinct.' Much may depend upon the facts of a particular case. Here, however, it is perfectly clear that the shipments with respect to each appellant were not 'separate and distinct.' Although the overall conspiracy between the Stracuzzas and the four appellants was not established, the proofs disclose as to each appellant a sufficient 'unity for the purpose of the statute.' All goods acquired by each appellant were acquired from the same distributor, Tony Stracuzza; all goods were acquired at the same discount according to a pre-arranged agreement; all shipments included within the indictment as to each appellant were concentrated within a specified time of no more than two and one-half months; each shipment had the same origin and destination; the merchandise shipped was all of the same type, ladies' and children's wear; and each appellant in negotiating with the Stracuzzas contemplated a number of transactions."

The language speaks for itself. No argument would make it less a finding of fact[15] nor more a plain usurpation of the functions of a jury.

This issue goes to the very roots of administration of criminal law. The relationship of judge and jury, and the respective responsibilities and functions of each, touch every prosecution. A very dangerous situation is presented when an appellate court undertakes to evaluate a cold record in order to make findings of fact. This Court had occa-

15. Petitioners sharply disagree with the factual finding of the Court of Appeals. See Petition for Rehearing, pp. 3-8. But what is more important, the case was not tried or submitted to the jury on the basis of aggregating shipments pursuant to an agreement.

sion to address itself to the question posed here in its decision in *Grunewald, supra.* Patently, the necessity for repetition of the principles there enunciated is unfortunately at hand. Sufficient indication of that necessity is derived from the fact that the same Court of Appeals decided both the *Grunewald* and this case.

Third. The real issue, which the Court of Appeals avoided by "fact-finding," is the important question of the scope of the National Stolen Property Act.

The issue here centers upon the meaning of the provision limiting the federal offense of transportation of goods in interstate commerce to shipments which exceed $5,000 in value. 18 U. S. C. §§ 2314, 2311.

No reasoned appellate decision has ever held that, in the absence of agreement giving several separate shipments "unity for the purpose of the statute," it is proper to aggregate the value of the shipments in order to reach the statutory minimum of $5,000. The court below expressly avoided any ruling on the point. "We need not now decide what ruling should be made in a case where the transactions are truly 'separate and distinct.'" The District Judge had earlier expressed grave doubts on the meaning of the statute. ". . . I am not too clear on what the definition in 2311 really means, where it says you can group these values together if they are included in one indictment" (16a).

The Fourth Circuit, admittedly in dictum, declared that the $5,000 value could not be established by simply adding together the values of discrete transactions. In *Andrews v. United States,* 108 F. 2d 511, 514 a case of conspiracy to violate the National Stolen Property Act, the court specifically said:

> "It is argued that no violation of the federal statute was committed or could have been the object of the conspiracy because the value of no one of the shipments was of a value of as much as $5,000. It is clear, however, that the various shipments made in 1937, which were of a total value in excess of $27,000, were not separate and independent transactions, but were made pursuant to the conspiracy between Sencindiver,

Andrews and Scher; and that this conspiracy gave them unity for the purpose of the statute. *While, of course, transactions which are entirely separate and distinct cannot be grouped for the purpose of establishing a value within the statute, they may be considered together where they are not separate and distinct but are the carrying out of a single plan or conspiracy.* The statute makes it a criminal offense to transport stolen goods of a value of $5,000 or more in interstate commerce; and it can make no difference that the transportation is accomplished by a number of different shipments, provided all are made pursuant to a single plan or agreement." [16] (Emphasis added.)

The action of the court below, in refusing to face the issue posed by the District Court, adds further evidence by implication of the difficulty encountered by lower courts in perceiving the proper meaning of the statutory scheme.

The legislative history of the National Stolen Property Act is less than lucid on the point in issue. It is known that the provision for aggregating amounts came into the Act as a product of compromise between the House and the Senate over the size of the monetary amount to be incorporated into the definition of the offense.[17] When those

16. To the same general effect are *Cartwright v. United States*, 146 F. 2d 133, 135 (C. A. 5) ("it is settled law that the value of things taken in separate larcenies can not be aggregated to make up one felonious larceny"), and *United States v. Thomas*, 135 F. Supp. 662, 663 (E. D. Pa.) (semble). The holding in *United States v. Segelman*, 86 F. Supp. 114, 124 (W. D. Pa.) is to the contrary, but without discussion.

17. Congress refused to pass a National Stolen Property Law which did not contain limitations on value, and it similarly refused to pass such a law which had a low $300 limitation. See H. R. 10287, H. R. Rep. No. 2528, 70th Cong., 2d Sess. (no limit); H. R. 119, H. R. Rep. No. 79, 71st Cong., 2d Sess. ($300 limit). Both bills passed the House; neither passed the Senate.

The measure which became the National Stolen Property Act of 1934 was recommended by the Attorney General with a $1,000 minimum or, alternatively, a $2,500 limit. S. Rep. No. 538, 73d

pressing for the highest amount, $5,000, prevailed, the provision for cumulating values was incorporated. The most likely interpretation of this legislative bargaining, therefore, would read the aggregation provision as a safeguard against efforts to evade the federal statute by keeping each shipment below $5,000 in value. Such an evasive tactic would necessarily arise out of an overall plan or agreement to transport goods worth more than $5,000. Accordingly the statute would not apply when separate and distinct transactions are involved.

Nothing in the history of the present National Stolen Property Act reflects an intention by Congress to change the rule of the *Andrews* case or to vary the common-law rule that separate petty larcenies could not be aggregated so as to make up the felony of grand larceny. See *The King v. Petrie*, 1 Leach C. C. 294. Furthermore, a single interstate shipment of goods worth $3,000 does not, as a matter of federal law, constitute a crime. Nor does a subsequent such shipment worth $3,000 violate the federal statute. *In the absence of an agreement or conspiracy or overall plan*, two non-criminal acts cannot retroactively be made an offense by aggregation.

This is reinforced by the repeated use of the phrases "series of transactions" and "series of violations," as the Court of Appeals notes in its summary of legislative history (pp. A6-A7, *infra*). The plain meaning of "series" denotes a succession of events having some connection or co-ordination, conforming to some overall arrangement, as the World Series in baseball. It is wholly inconsistent with

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Cong., 2d Sess. p. 2. The Senate adopted a bill with the $1,000 amount, but the House now insisted on the $5,000 figure and prevailed. See H. R. Rep. No. 1462, 73d Cong., 2d Sess. p. 2; H. R. Rep. No. 1599, 73d Cong., 2d Sess. p. 3.

The House version of the bill ". . . added a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more." H. R. Rep. No. 1462, *supra*.

the "separate and distinct" formulation under which petitioners were tried.

We submit therefore that the interpretation of this statute is a fitting and proper exercise of the certiorari jurisdiction of this Court. Lower court judges have expressed confusion and need guidance on the meaning to be ascribed. The question is made doubly important in that the National Stolen Property Act superimposes a federal offense in matters of traditional and general state jurisdiction. Delicate questions of federal-state relations are affected by the expansion of the scope of federal criminal legislation. See, *e.g.*, Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law and Contemp. Prob. 64 (1948). All these factors operate to make this a case in which the writ of certiorari ought to be granted.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1959.

Appendix.

APPENDIX A.

Opinion Below.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 160—October Term, 1958.

(Argued December 4, 1958 Decided April 21, 1959.)

Docket No. 25328

UNITED STATES OF AMERICA,
Appellee,

—*v.*—

MAX SCHAFFER, NORMAN SCHAFFER, BENJAMIN T. MARCO and HYMAN KARP,
Defendants-Appellants,

ANTHONY STRACUZZA, MARIO STRACUZZA and DOROTHY STRACUZZA,
Defendants.

Before: SWAN, MEDINA and WATERMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Thomas F. Murphy, *Judge.*

Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco appeal from a judgment convicting them of knowingly transporting stolen goods in interstate com-

merce in an amount exceeding $5,000 in violation of 18 U. S. C. Section 2314. No opinion below. Affirmed.

JOHN T. MORAN, New York, N. Y., Assistant United States Attorney (Arthur H. Christy, United States Attorney and George I. Gordon, Assistant United States Attorney, New York, N. Y., on the brief), *for appellee.*

JACOB KOSSMAN, Philadelphia, Pa. (Irving W. Coleman, Northampton, Pa., on the brief), *for Max Schaffer and Norman Schaffer, defendants-appellants.*

HARRIS B. STEINBERG, New York, N. Y., *for Hyman Karp and Benjamin T. Marco, defendants-appellants.*

MEDINA, *Circuit Judge:*

Defendants-appellants Max Schaffer, Norman Schaffer, Benjamin T. Marco, and Hyman Karp were convicted of violating Section 2314 of title 18, United States Code by knowingly transporting stolen merchandise consisting of ladies' and children's wearing apparel of a value in excess of $5,000 in interstate commerce.[1] Appellants were tried together to a jury on two indictments, only the first of which is relevant here. The second indictment, containing a single count charge of conspiracy to violate 18 U. S. C. Section 659, by receiving and concealing goods stolen in interstate commerce, of a value of more than $100, knowing the same to have been stolen was dismissed at the close of the prosecution's case.

The first indictment is in four counts. Count one charges defendants Max and Norman Schaffer and three

1. 18 U. S. C. Section 2314 provides:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *"

other defendants, Anthony (Tony) Stracuzza, Mario Stracuzza and Dorothy Stracuzza, with knowingly transporting stolen merchandise between the Southern District of New York and Lebanon, Pennsylvania, during the period from May 15, 1953 to and including July 27, 1953. Count two charges a similar violation by the Stracuzzas and Marco, the transportation taking place between the Southern District of New York and Bluefield, West Virginia, during the period from June 11, 1953 to and including July 27, 1953. Count three charges a similar offense by the Stracuzzas and Karp, the transportation occurring between the Southern District of New York and Fall River, Massachusetts, during the period from May 21, 1953 to and including July 27, 1953. The fourth count charges the four appellants and the three Stracuzzas with a conspiracy to transport stolen merchandise in interstate commerce during the period from September 1, 1952 to October 20, 1954.

Tony and Mario Stracuzza pleaded guilty prior to trial and the indictment of Dorothy Stracuzza was severed and pending at the time of the trial. At the conclusion of the prosecution's case, which took a little over two weeks to present, each of the appellants rested without calling any witnesses in his behalf. The Court, on motions made by the appellants, dismissed the conspiracy count. The substantive counts went to the jury, the principal issue being whether or not each defendant knew that the goods he received from the Stracuzzas was stolen. Each defendant was found guilty of the substantive charge made against him. The two Schaffers and Karp were each sentenced to two years imprisonment, and each was fined $10,000. Marco received a sentence of four years imprisonment and a fine of $10,000. All appellants were released on bail pending appeal.

The Government proved that each appellant, a retail garment store owner, entered into a standing agreement with Tony Stracuzza by which merchandise was shipped to him at substantial discounts, previously agreed upon.

This merchandise was stolen by Mario Stracuzza, Tony's brother and assistant, who induced various truck drivers to turn the goods over to him for a share of the profits. Such practices had been going on for several years and this illegal business had been initially operated by Sol Eisenberg and Hymie Berk. At first acting in a subordinate capacity with Eisenberg and Berk, Tony along with his brother Mario later formed a partnership with Berk in September 1952 and did business under the name A. Finkel. This partnership lasted until March 1953. Each of the appellants did business with Berk and Eisenberg and all but Marco did business with A. Finkel.

In May 1953 Tony and Mario set out on their own and began operations under the name A. Schafler. It is the appellants' dealings with this concern that are the basis of the indictment. Goods were sent to each appellant at rates 55-65% of the original manufacturer's price. According to agreement Tony Stracuzza sent each appellant the original manufacturers' invoices with each shipment. Max and Norman Schafler visited each of Stracuzza's various establishments on several occasions and they saw both the merchandise and the manufacturers' invoices. Karp also visited all establishments but A. Schafler's and Marco dealt personally with Stracuzza at Berk and Eisenberg's and at A. Schafler's. The wealth of other evidence produced on trial need not be detailed at this point but will be alluded to as it becomes relevant.

Appellants make the following points: (1) that it was error to refuse to dismiss the indictment and to direct a verdict of acquittal in favor of each appellant on the ground that the aggregation of the value of various shipments was permitted despite the fact that no single shipment to any appellant was of a value of $5,000;[2] (2) that

2. Appellants Karp and Marco also claim that it was error with respect to them to submit the substantive charges against them to the jury because of the alleged absence of proof that the merchandise sold to them was stolen.

it was error to submit any of the substantive charges to the jury in view of the dismissal of the conspiracy count, due to the prejudicial effect on each appellant of the evidence admitted in support of the conspiracy count and the evidence received against each of the other appellants in support of the substantive charges; and (3) that it was error to refuse to direct a mistrial because of allegedly prejudicial and improper comments made by the prosecutor in his summation to the jury.

We shall discuss these contentions *seriatim*, but find no merit in any of them.

The Propriety of Aggregating Shipments

It is conceded that no shipment to any appellant was worth as much as $5,000. On the other hand, it is agreed that if shipments may be aggregated, the statutory requisite is far exceeded.[3] The judicial authority on this point is rather meager and we think with good reason.[4] For the answer has been spelled out in no uncertain terms in the statute and in the legislative history.

Section 2311 of title 18, U. S. C. furnishes the basic definitions used in the chapter on stolen property which includes sections 2311 through 2317. It is there provided:

> "'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

That the statute means precisely what it says is shown by the following excerpts from the relevant Congressional reports:

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3. The evidence indicates that the goods purchased and transported by the Schaffers were worth wholesale $19,531.52; by Karp, $17,175.24; by Marco, $23,080.14.

4. See *Andrews v. United States*, 4 Cir., 1939, 108 F. 2d 511; cf. *United States v. Segelman*, W. D. Pa., 1949, 86 F. Supp. 114.

H. R. Rep. 1462, 73d Cong., 2d sess., p. 2 (1934)—

> "As reported by your committee, the jurisdiction of the Federal Government is limited to cases in which the value of the stolen property is $5,000 or more, except in cases of pledging or accepting in pledge such property for a loan in which case the minimum is set at $500. *There is added a provision which authorizes Federal jurisdiction in the case of a series of transactions* involving property of a total value of $5,000 or more." (Emphasis added.)

The reason for the $5,000 limitation is given in this same report. It continues:

> "It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government judisdiction are the figures asked and recommended by the Attorney General."

H. R. Rep. 1599 (Conference Report), 73d Cong., 2d sess., p. 3 (1934) contains the following:

> "The second amendment of the House added, also, a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more. The Senate agreed to the amendment."

H. R. Rep. 422, 76th Cong., 1st sess., pp. 1-2 (1939)—(in amending the Stolen Property Law) reads:

> "It is to be noted, in this connection, that under the terms of section 5 of the Act in the event the defendant is charged with a series of violations, the aggregate value of the property referred to in the indictment may be taken to make up the minimum valuation."

As the "series of transactions" between the Stracuzzas and each appellant related to stolen merchandise of "the aggregate value of more than $5,000, the case clearly meets the statutory test.

Appellants appear to contend that each of the shipments was separate and distinct from the others as they cite *Andrews v. United States*, 4 Cir., 1939, 108 F. 2d 511, a case where transactions involving values less than $5,000 were aggregated, as the conspiracy established in that case "gave them unity for the purpose of the statute." By way of dictum (p. 514) it was said that "transactions which are entirely separate and distinct cannot be grouped for the purpose of establishing a value within the statute." We need not now decide what ruling should be made in a case where the transactions are truly "separate and distinct." Much may depend upon the facts of a particular case. Here, however, it is perfectly clear that the shipments with respect to each appellant were not "separate and distinct." Although the overall conspiracy between the Stracuzzas and the four appellants was not established, the proofs disclose as to each appellant a sufficient "unity for the purpose of the statute." All goods acquired by each appellant were acquired from the same distributor, Tony Stracuzza; all goods were acquired at the same discount according to a pre-arranged agreement; all shipments included within the indictment as to each appellant were concentrated within a specified time of no more than two and one-half months; each shipment had the same origin and destination; the merchandise shipped was all of the same type, ladies' and children's wear; and each appellant in negotiating with the Stracuzzas contemplated a number of transactions.

Appellants admit that the Congress seems to have intended to permit aggregating shipments to meet the $5,000 requirement. But they urge that such a construction might make acts which were "innocent when done" criminal upon the occurrence of subsequent events, i.e. other acts of a similar nature. Such retrospective criminality is then

likened to the doctrine of trespass *ab initio*, a doctrine repeatedly repudiated by the Supreme Court. *McGuire v. United States*, 1927, 273 U. S. 95, 98-99; *Zap v. United States*, 1946, 328 U. S. 624, 629; *On Lee v. United States*, 1952, 343 U. S. 747, 751-52.

There is no merit whatever in this contention. Nor are we able to perceive how the transportation of stolen goods knowing them to have been stolen could be regarded as "innocent when done," regardless of the amount involved. The only reason for the $5,000 limitation is to avoid overtaxing the Department of Justice. There is no legitimate interest of appellants which the Congress sought to protect by this requirement. Hence it is perfectly rational to consider past acts in determining whether any appellant's conduct is important enough to warrant prosecution by the Department of Justice.

Finally, the Supreme Court's rejection of the doctrine of trespass *ab initio* is both irrelevant and cited out of context. In the cases cited *supra* the Court was faced with the problem of whether or not the Government could use evidence lawfully obtained after a lawful entry if, subsequent to the lawful entry, the agents who obtained the evidence committed unlawful acts unconnected with the obtaining of the evidence sought to be introduced. In each instance the Court held that the Constitution did not prevent the Government from using the evidence and that the subsequent unlawful acts did not affect the entry so as to "taint" the evidence. The policy considerations underlying the doctrine of trespass *ab initio*, i.e., to punish tortfeasors and to aid their victims, were found inapplicable to the situations there presented. In the case before us there is no "innocent" act being "tainted" by subsequent occurrences; there is no legitimate interest of appellants worthy of protection; and the Congress has a very definite stake in curbing such socially undesirable conduct. Hence we conclude there is no reason for construing the clear mandate of the Congress in any way other than that which was intended.

Appellants Karp and Marco claim that the $5,000 requirement of the statute was not met as they say there was no proof that any particular merchandise purchased by them was stolen. Indeed, they appear to assert that as Mario Stracuzza was the man who induced the truck drivers to steal the original packages and sell them to him, and as Mario did not testify, the whole case collapsed. We think it clear beyond peradventure of doubt on this record that, as testified by Tony Stracuzza, all the merchandise he dealt with as "distributor" was stolen merchandise. The collation of the various proofs of this fact vis-a-vis appellants Karp and Marco would be a work of supererogation.

Were Appellants Prejudiced by the Joint Trial

Were it not for the conspiracy count, it would have been clearly erroneous to try the appellants together under Rule 8(b), Fed. R. Crim. P.[5] For there would be no common participation "in the same act or transaction constituting an offense" which is a requisite to joinder. See *Kotteakos v. United States*, 1946, 328 U. S. 750; *McElroy v. United States*, 1896, 164 U. S. 76; *Brooks v. United States*, 5 Cir., 1947, 164 F. 2d 142. However, the allegation of a conspiracy count meets the requirements of Rule 8(b) and hence at the outset the joinder was proper and within the discretion of the trial court. *United States v. Ball*, 1896, 163 U. S. 662; *United States v. Lebron*, 2 Cir., 1955, 222 F. 2d 531, cert. denied, 350 U. S. 876; *United States v. Cohen*, 2 Cir., 1941, 124 F. 2d 164, 165, cert. denied *sub nom. United States v. Bernstein*, 315 U. S. 811.

5. Rule 8(b) provides:

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Moreover, it is not claimed, nor could it be with any show of reason, that the conspiracy count was alleged by the prosecution in bad faith.

Accordingly, as provided in Rule 14, Fed. R. Crim. P.,[6] we must determine on this appeal whether appellants, or any of them, were prejudiced by the joinder. *Berger v. United States*, 1935, 295 U. S. 78; *United States v. Chieppa*, 2 Cir., 1957, 241 F. 2d 635, cert. denied *sub nom. Ivicola v. United States*, 353 U. S. 973; *Monroe v. United States*, D. C. Cir., 1956, 234 F. 2d 49, cert. denied, 352 U. S. 873. The mere fact that the conspiracy count is dismissed at the close of the evidence by the trial judge, or that a verdict of acquittal on that count is returned by the jury, does not establish as matter of law that it was error to submit the substantive charges to the jury.

Appellants assert they were prejudiced by the joinder on two levels, general and specific. The Shaffers are content to claim that the mere idea of receiving individual treatment in a case that took over two weeks to try, involved hundreds of exhibits, numerous witnesses, and four separate defendants is so far-fetched that prejudice must be deemed to result as a matter of law. See *Kotteakos v. United States*, *supra*, 328 U. S. 750.

This contention is belied by the record which reveals several precautionary measures taken to assure defendants of a fair trial and indicates no reason whatever why the jury should have been confused. First, each defendant was represented by a separate attorney except that Max and Norman Schaffer had one common counsel. Secondly, with virtually every offer of proof, testimony or exhibit, an instruction was requested and obtained that proof admitted with respect to one defendant was not to be con-

6. Rule 14 which provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

sidered with respect to any other defendant. Over fifty such requests and instructions were given. Third, the witnesses were called in orderly fashion so that each group of witnesses focused on a separate defendant. This practice was uniformly observed throughout the trial with but one minor exception. Finally, the Court's charge—admitted to be fair even by appellants' attorneys—carefully reviewed the evidence pro and con with respect to each defendant. And a clear direct admonition was given to keep the three distinct charges separate and not to consider evidence bearing on one defendant against another. Thus it is plain upon the face of the transcript of the testimony that throughout the trial Judge Murphy was scrupulously careful to protect the rights of each of the defendants and to make sure that none of them suffered prejudice from the joinder.

Moreover, there was nothing intrinsically complex about either the nature of the case, or of any testimony or exhibit, nor were the instructions of Judge Murphy to the jury in the slightest degree confusing or ambiguous. We have no problem of evidence admitted against one appellant which incidentally implicates another. There was only one witness common to all defendants, Tony Stracuzza, and he gave his testimony in orderly fashion describing his business and then his relationship and his transactions with each defendant in turn. Each defendant lived in a different part of the East, except the two Schaffers who operated their store together; and there is nothing in the record to indicate that any one of them knew of Stracuzza's dealings with the others.

In the face of cautionary instructions from the trial judge, far greater possibilities of confusion have been tolerated on the premise that the jury can and will do as it is told. See *Delli Paoli v. United States*, 1957, 352 U. S. 232; *Opper v. United States*, 1954, 348 U. S. 84; *Blumenthal v. United States*, 1947, 332 U. S. 539; *Berger v. United States*, 1935, 295 U. S. 78; *United States v. Bando*, 2 Cir.,

1957, 244 F. 2d 833; *United States v. Chieppa, supra*, 2 Cir., 1957, 241 F. 2d 635, cert. denied, *sub nom. Ivicola v. United States*, 353 U. S. 973; *United States v. Lebron*, 2 Cir., 1955, 222 F. 2d 531, cert. denied, 350 U. S. 876; *United States v. Leviton*, 2 Cir., 1951, 193 F. 2d 848, cert. denied, 343 U. S. 946; *Nash v. United States*, 2 Cir., 1932, 54 F. 2d 1006, cert. denied, 285 U. S. 556; *Robinson v. United States*, D. C. Cir., 1954, 210 F. 2d 29; *Dunaway v. United States*, D. C. Cir., 1953, 205 F. 2d 23.

The case here is a far cry from the state of affairs disclosed in *Kotteakos v. United States, supra*, 328 U. S. 750. There 32 defendants were listed in the indictment and 19 were brought to trial. While one huge conspiracy was charged, there was testimony concerning eight separate conspiracies, and the trial court had not only not cautioned the jury about the possibilty of many conspiracies and the need to consider the evidence as to each separately, but it instructed the jury that it might consider the overt acts of one conspiracy as proof of the guilt of other conspirators, whether in the same conspiracy or not. Here we have but four defendants whose individuality was carefully observed and protected by both the trial judge and the prosecutor, and a state of proof that we think demonstrates that the evidence adduced against each separate defendant could readily be considered as applicable to him alone.

Appellants Karp and Marco press the point further. They assert that some evidence was received which was admissible only for purposes of establishing the conspiracy and they suggest a few specific instances of evidence received against one defendant, subject to connection as to the others, which is claimed to have been prejudicial. None of these assertions of prejudice will bear analysis.

First, it is claimed that the testimony of Tony Stracuzza to the effect that each of the appellants had purchased stolen goods from Stracuzza's former employers, Berk and Eisenberg, during a six-month period prior to the date of the conspiracy charged in the indictment related

only to establishing the conspiracy. However, it is well established that where criminal intent is an essential element of the crime charged, prior instances of a similar pattern of operation are relevant to establish scienter. See 2 Wigmore, Evidence, Section 325 (3d Ed. 1940); *United States v. Brand*, 2 Cir., 1935, 79 F. 2d 605, cert. denied, 1936, 296 U. S. 655. The proof as to these prior dealings showed the same use of manufacturers' invoices and the same substantial discounts from the manufacturers' wholesale prices as did the evidence concerning the transactions alleged in the indictment.

On the day of Stracuzza's arrest, the F. B. I. found in Stracuzza's office a number of original manufacturers' invoices and a sealed carton of merchandise addressed to Karp which contained such invoices. These exhibits were admitted into evidence, and appellants Karp and Marco assert only for the purpose of proving the conspiracy. However, it is apparent that such evidence was admissible substantively against all defendants since it tended to corroborate Stracuzza's allegedly "tainted" testimony concerning his practice of regularly including the manufacturers' invoices in his shipments.

Both Marco and Max Schaffer gave signed statements to the F. B. I. which were quite damaging to their cases, Marco's because it admitted contact with Eisenberg, Schaffer's because it was falsely exculpatory. However, in each instance the Court instructed the jury to consider the exhibit only against the defendant against whom it was offered and later repeated this admonition when the conspiracy count fell through.

Similarly, what were claimed to be humorous remarks by Marco to the effect that the goods were stolen, testimony of an employee of Marco concerning the removal of labels from A. Schafler merchandise and the insertion of new ones, an F. B. I. motion picture of Max Schaffer leaving Stracuzza's office on July 28, 1953, the day of Stracuzza's arrest, and testimony of Karp's dealing in stolen

zoot suits were all accompanied by appropriate limiting instructions by the Court.

But when these items of proof are broken down, as they were in the summations to the jury, it is clear that each item is of such a character as to affect only the person involved. For example Max Schaffer alone was depicted in the motion picture showing him inspecting merchandise and documents, claimed by the prosecution to be manufacturers' invoices, in Stracuzza's show-room; and he is the very man who, shortly after the taking of the motion picture, told the F. B. I. men that he had never been in the place. So it was with reference to Karp's dealings with the stolen zoot suits, and his telephone conversation with Stracuzza about protection. In view of the repeated instructions on the point, no member of the jury could have supposed that these fragments of the prosecution's evidence affected any other defendant than the one involved in the particular matter testified to.

At best appellants' claims of prejudice come down to a complaint about the guilty "atmosphere' built up by associating each with others so obviously guilty, and the fact that a "tainted" witness was buttressed by the independent proof relating to all defendants, instead of that relating to one alone. Of course, the fact that each appellant makes these claims somewhat weakens their force. But in the absence of any bad faith on the part of the government in bringing the conspiracy count, the repeated interim instructions and the charge of the Court protecting each defendant's individuality have been traditionally considered as sufficient safeguards for those accused of crime. We conclude that none of the defendants suffered prejudice from the joinder.

There was more than ample proof to sustain a finding that each defendant knew the goods he was buying from Stracuzza were stolen, and that is all there is to the case. The attack on Stracuzza's credibility was a formidable one, amply justified by his record; but his credibility was a question solely for the jury to determine.

The Propriety of the Prosecutor's Summation

During the course of their summation appellants sought to discredit the testimony of Tony Stracuzza by alluding to the Government's alleged breach of duty by its failure to call either Mario or Dorothy Stracuzza to corroborate his story. After pointing out that Mario's testimony would only be cumulative, that Dorothy's indictment was still pending, and that the defendants could have called them to the stand themselves had they wanted to, the prosecutor made the following comments.

> "Now in making these comments as to the conduct of the prosecution, there was some criticism as to the extent that the Government failed in its obligations to its citizens to bring out all the facts. I say to you as an assistnat United States Attorney, my job is not to convict people, but is to bring them here in court, give them a fair chance to meet the charges that the Government has presented against them.
>
> The motto on the building of the Department of Justice in Washington I think fairly indicates the attitude of the Government, as far as citizens are concerned. It reads:
>
> > 'The Government wins when justice is done its citizens in the court.'
>
> Now, of course, if you believe that the Government has in some way or other prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march right into that jury-room and acquit every one of these defendants."

Far from inserting the prosecutor's personal integrity into the case, these extracts demonstrate a commendable candor and sense of fair play by the Government in permitting the jury to draw inferences from the evidence or lack thereof. Thus calling attention to the duties of a

prosecutor did not constitute any representation of the prosecutor's integrity. It was no more than a legitimate and proper answer to an argument advanced in the summation of appellants' counsel. Moreover, the trial judge later properly instructed the jury that no unfavorable inference could be drawn as to Stracuzza's testimony from the Government's failure to call other witnesses in view of the fact that these witnesses were equally available to the defense.

Affirmed.

APPENDIX B.

Judgment Below.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty first day of April one thousand nine hundred and fifty nine.

Present:

HON. THOMAS W. SWAN,
HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

United States of America,
Plaintiff-Appellee

v.

Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco,
Defendants-Appellants

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C.

Order.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States of America,
Appellee,

-against-

Max Schaffer, Norman Schaffer, Benjamin T. Marco, Hyman Karp,
Defendants-Appellants,

Anthony Stracuzza, Mario Stracuzza, Dorothy Stracuzza,
Defendants.

Before: SWAN, MEDINA and WATERMAN, *Circuit Judges.*

On Petition for Rehearing on behalf of appellants Max Schaffer and Norman Schaffer; and, alternatively, Motion to Stay Issuance of Mandate and to Continue Bail.

Irving W. Coleman, Northampton, Pa., and Jacob Kossman, Philadelphia, Pa., for appellants, Max and Norman Schaffer.

PER CURIAM.

Petition for rehearing denied.

Motion to stay issuance of mandate and to continue bail granted.

/s/ THOMAS W. SWAN,
/s/ HAROLD R. MEDINA,
/s/ STERRY R. WATERMAN,
C.J.J.

May 18, 1959.

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JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

October Term, 1958

No. [redacted] 122

HYMAN KARP and BENJAMIN T. MARCO,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRIS B. STEINBERG
25 Broad Street
New York 4, New York
Attorney for Petitioners Karp and Marco

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IN THE

Supreme Court of the United States

October Term, 1958

No.

HYMAN KARP and BENJAMIN T. MARCO,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

A. The Opinion Below

The Court of Appeals for the Second Circuit wrote an opinion, which has not yet been reported. Said opinion is printed in Appendix A, to the companion petition of the co-defendants Max and Norman Schaffer (No. 995, Oct. 1958 Term), and reference is respectfully made thereto.

B. Grounds on Which Jurisdiction of This Court Is Invoked

1. The judgment of the Court of Appeals sought to be reviewed was handed down on April 21, 1959. Said judg-

ment is printed in Appendix B to the Schaffer petition, *supra*, and reference is respectfully made thereto.

2. The Court of Appeals denied a petition for rehearing by order dated May 18, 1959. Said order is printed in Appendix C to the Schaffer petition, *supra*, and reference is respectfully made thereto. No extension of time within which to petition for certiorari has been requested or granted.

3. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U. S. C. Section 1254 (1).

C. Questions Presented

1. Did the prosecutor's remarks in summation, wherein he made representations to the jury, as of his personal knowledge, of matters not in the record, and wherein he tendered to the jury a false issue as to his own veracity and position, and made himself an unsworn witness for the prosecution, deprive petitioners of a fair trial?

2. Rule 8 (b) of the Federal Rules of Criminal Procedure recognizes and reflects the fundamental right of a criminal defendant to be tried alone and the justified opprobrium attaching to the mass trial. After a conspiracy count against several defendants is dismissed for lack of evidence, is it proper to continue a joint trial and to submit to a single jury the remaining counts, charging each defendant with an independent and unrelated offense?

3. Where the District Court has plainly refused to submit an issue of fact to the jury for its determination, can

the Court of Appeals properly affirm a conviction by reviewing the evidence and making a finding on that issue of fact adversely to the defendants?

4. The National Stolen Property Act makes certain interstate transportation a federal crime if the goods exceed $5,000 in value. Can this statute be interpreted to permit a conviction where the value element of the offense is established by adding together the values of several separate and distinct transactions, no one of which constituted a federal offense since the goods involved were valued at less than $5,000?

D. Statutes and Rules Involved

The statutes and rules involved are:

1. 18 U.S.C. Section 2311;
2. 18 U.S.C. Section 2314;
3. Rule 8 (b) of the Federal Rules of Criminal Procedure;
4. Rule 14 of the Federal Rules of Criminal Procedure.

All of the foregoing are set forth in the Schaffer petition, at pages 3 and 4, and reference is respectfully made thereto.

E. Statement of Facts

The petitioners respectfully refer to the "Statement of the Case", which appears at pages 5 to 8, inclusive, of the Schaffer petition, and adopt such statement.

It should be noted that petitioner Karp, on conviction, was sentenced to two years' imprisonment, and the payment of a fine of $10,000, and petitioner Marco was sentenced, after conviction, to four years' imprisonment and the payment of a $10,000 fine (pp. 15a to 18a, inclusive, Appendix of Appellants Karp and Marco).

Petitioners Karp and Marco, while joining in all the points and contentions made by the Schaffers, urge one additional ground for the granting of the writ herein, to wit, deprivation of fair trial by reason of the prosecutor's arguments in summation. Accordingly, the following facts, in addition to those set forth by the Schaffers, require mention here.

The cornerstone of the prosecution's case was the testimony of one Anthony Stracuzza, a confessed thief, admitted loan shark, gambler and tax-dodger; brother of Mario Stracuzza, another confessed and several-times-convicted thief; and husband of Dorothy Stracuzza, arrested and indicted in several cases, including the one at bar. Stracuzza gave important testimony bearing on the single, principal and crucial issue of the alleged guilty knowledge of the petitioners in buying the stolen goods from him. There never was any question but that all the petitioners had openly bought the goods, paid by check, and received shipments via recognized agencies; they had maintained complete written records of the transactions in their books, which were voluntarily turned over to the F.B.I. when the latter commenced their inquiry.

Anthony Stracuzza was accordingly subjected to heavy attack as to his credibility, on cross-examination. Basic in this attack was the consistent contention of the defense,

throughout the trial, that he was tailoring his testimony to favor the Government, in the expectation of a "reward"—lenient treatment for himself, his brother and his wife.

Thus, Anthony had been charged not only in the two indictments tried in the instant case, but he had also been indicted jointly with a number of truck-driver package thieves; in all of these cases he had pleaded guilty; in one additional case, resulting from a theft *after* he began to "cooperate" with the F.B.I., he had received a suspended sentence, with the help of the prosecutor, and in the others sentence had been repeatedly postponed, until after his testimony was given in the instant case. Mario, his brother, was in like state; he had pleaded guilty to three indictments, and his sentence was repeatedly adjourned until after the present trial. Moreover, Mario had been caught by State authorities in a theft *after* he began his "cooperation", and, on his plea of guilty in the State Court, sentence had been repeatedly postponed there, on representations that he was "cooperating" in the instant case, and his testimony was necessary. Finally, Anthony's wife, Dorothy, similarly indicted in the Federal Court in three cases, had been accorded a severance of trial, had never been placed on trial, had never pleaded guilty, and indeed, had never even been called as a witness in any trial.

Anthony and Mario had both testified at length for the Government in the prior trial of the thieves. Anthony, in the present trial, maintained that his wife had no guilty knowledge of his illegal activities (Tr., pp. 594, 599, 600-602), although he admitted testifying to precisely the opposite effect at the previous trial (Tr., pp. 594-595); in this connection he admitted that she maintained several bank accounts under different names, one of which was not her

own, in which proceeds of his sales to these defendants were deposited (Tr., pp. 491, 519, 649-651); that some of the checks were cashed in supermarkets (Tr., p. 523), that she had worked for several weeks in his office, up to the time of his arrest, making out bills, changing tickets on merchandise, and keeping records (Tr., pp. 600-601). Indeed, the fictitious name of the business ("A. Schafler"), was very much like her own maiden name "Schaefler" (Tr., pp. 595-598). In sum, she did everything, and knew everything—and far more—which it was charged the defendants did and knew, to fasten guilty knowledge on them, and yet she was claimed by Stracuzza to be innocent of wrongdoing.

The defense stated in the opening that it would prove its contention that the Stracuzzas were testifying for an anticipated reward in the shape of hoped-for lenient treatment (Tr., p. 299); it made known its contention that the government was under a duty to call Mario and Dorothy as witnesses, so that they could be subjected to cross-examination, and vigorously protested the prosecutor's refusal to do so (Tr., pp. 1157-1160); it tried unsuccessfully to introduce in evidence the complete statements which were made by the Government to the sentencing judge at the time Stracuzza was given a suspended sentence on a previous case (Tr., pp. 670-678); and attempted unsuccessfully—because the court kept it out—to show, by available court record evidence, that the large sums of cash seized from the possession of Mario and Dorothy Stracuzza, when they were arrested, were later returned to them with the consent of the United States Attorney when they "cooperated" (Tr., pp. 874-875).

Finally, in summation the defense argued that the Government's failure to call Mario and Dorothy o the stand, thus preventing their cross-examination, wa relevant in considering whether or not Anthony Stracuzza was testifying in hopes of a reward for himself and the members of his family (Tr., pp. 1471-1477, 1484).

The relevant excerpts from the defense summation are set forth in the Appendix of Karp and Marco, pages 1a to 9a, inclusive.

In answer, the prosecutor made certain statements, to which objection was noted, a motion for mistrial made and denied, and exception taken. (See Appendix of Karp and Marco, pp. 10a and 11a.) The tenor of these remarks was a disingenuous and misleading statement to the jury that Dorothy Stracuzza was "still a defendant in this court. The charges are still open against her. They have not been dismissed in any way" (Tr., p. 1550). Actually, on July 31, 1958, shortly after the present trial was completed, the Government entered *nolle prosequis* in all the cases against Dorothy Stracuzza (Tr., pp. 1689-1690).

Furthermore, the prosecutor went on to tell the jury that it was "the Government's representation to you that he [Mario Stracuzza, the brother, not called to the witness stand] could have offered nothing in the way of additional evidence that was not presented to you through his brother. • • • Furthermore, the Government is not required to call any witness if we believe that there is nothing further that that witness can contribute in the search for the truth" (Tr., pp. 1550-1551).

This "representation" of the prosecutor's own knowledge of the case, and the statement of his "belief" must be

weighed in light of the fact that although Anthony claimed that everything he sold to the defendants was stolen, he admitted that he had very little personal knowledge of the details of this crucial element in the case, since it was his brother Mario, and not he, who had carried on the actual negotiations with the thieves, and it was Mario who had bought and paid for the stolen goods (Tr., pp. 388, 584-585, 586-587, 589). On the important issue of the defense claim of "reward" for Stracuzza's testimony, the defense was effectively blocked, by the Government's failure to call Mario, from showing (a) that Mario, when arrested, had had $900 in cash on his person, presumably for the purchase of stolen goods; that Dorothy, at the same time, had $1,900 in cash on her person; that this money had been seized by the F.B.I. as evidence; and that these sums were released to Mario and Dorothy, with the prosecutor's consent, after they began to "cooperate" (Tr., pp. 874-875); (b) from showing that Mario had again been caught stealing, after he began to "cooperate", and although indicted in the State court, his sentence there was repeatedly adjourned, on the representation that he was "cooperating" with the Federal authorities, and that he would testify in this case, which of course, he never did (Tr., p. 1158). There can be little doubt that considerations of strategy to accomplish this blocking of cross-examination, rather than any reluctance to clutter the record with cumulative testimony, was the real reason for the failure to call Mario. Mario, we note, did testify at length in the previous trial, and was there subjected to searching and embarrassing cross-examination (Tr., p. 1158).

The prosecutor concluded by telling the jury that "if you believe that the Government has in some way or other

prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty —you have to march into that jury room and acquit everyone of these defendants" (Tr., pp. 1551-1552). We submit that this was an improper tender to the jury of a false issue of the prosecutor's integrity, as a substitute for the real issue of the defendants's guilt. He was giving the jury the ineluctable choice of convicting the defendants, or, in effect, convicting him of impropriety.

Reasons for Granting the Writ

Petitioners Karp and Marco respectfully refer to, and adopt, the "Reasons for Granting the Writ" advanced in the Schaffer petition, at pages 9 to 20, inclusive.

In addition, Karp and Marco submit that the manifest impropriety of the prosecutor's summation, which was promptly objected to, and made the subject of a motion for mistrial, deprived them of a fair trial, and requires the granting of a writ. The court gave no indication that the prosecutor's closing arguments were improper, and administered no rebuke, nor did it give ameliorating or corrective instructions. The affirmance in the court below of this ruling was in conflict with the rules laid down not only in this Court (*Berger* v. *United States* [1935] 295 U. S. 78, 88), and in the Second Circuit (*United States* v. *Spangelet* [1958] 258 F. 2d 338), but with holdings in other circuits (*United States* v. *Tucker*, No. 12,628, Third Circuit Court of Appeals, decided May 8, 1959, not yet reported; *Nalls* v. *United States* [5th Cir. 1957] 240 F. 2d 707; *Snipes* v. *United States* [6th Cir. 1956] 230 F. 2d 163; *Pierce* v. *United*

States [6th Cir. 1936] 86 F. 2d 949, 953), as well as holdings in numerous state courts (*People* v. *Lovello* [1956] 1 N. Y. 2d 436; *People* v. *Tassiello* [1950] 300 N. Y. 425, 428-431; *People* v. *Black* [1925] 317 Ill. 603; *People* v. *Hoffman* [1948] 399 Ill. 57; *Balis* v. *State* [1940] 137 Neb. 835; and see collected cases in 75 A.L.R. pp. 48-59, and 50 A.L.R. 2d, pp. 754-868).

To allow the opinion of the court below to stand, with its acceptance of the prosecutor's summation as a proper answer to the defense summation, would be to open the door to a new type of advocacy on the part of the Government, destructive of basic concepts of fairness.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Karp and Marco

June, 1959.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 111

MAX SCHAFFER AND NORMAN SCHAFFER, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 122

HYMAN KARP AND BENJAMIN T. MARCO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. A1-A16)[1] is not yet reported.

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[1] "Pet." refers to the petition for writ of certiorari of Max and Norman Schaffer. "R." refers to the record, which is in four volumes. "Tr." refers to the typewritten transcript.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1959. A petition for rehearing was denied on May 18, 1959 (Pet. A18). The petition for a writ of certiorari in No. 111 was filed on June 11, 1959, and the petition in No. 122 was filed on June 17, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in continuing the trial of the petitioners under the substantive counts of the indictment after the conspiracy count had been dismissed.

2. Whether it was properly determined that the stolen property had an aggregate value of more than $5,000.

3. Whether the United States Attorney improperly answered a defense argument relating to the nonproduction of witnesses equally available to both sides.

STATUTES AND RULE INVOLVED

18 U.S.C. 2314 provides, in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 2311 provides, in pertinent part:

> As used in this chapter:
>
> * * * *
>
> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

Rule 8(b), F. R. Crim. P. provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

STATEMENT

The petitioners were convicted in the District Court for the Southern District of New York on charges of transporting in interstate commerce goods known to have been stolen, having a value of more than $5,000. The two Schaffers and Karp received sentences of two years imprisonment and a fine of $10,000. Marco was sentenced to four years imprisonment and a fine of $10,000 (II-R, 69a). The Court of Appeals affirmed (Pet. App. B).

The indictment was in four counts. The first count alleged that, during a period from May 15, 1953, to July 27, 1953, Max and Norman Schaffer, together with Anthony, Mario and Dorothy Stracuzza, knowingly transported stolen goods, consisting

of ladies' and children's wearing apparel, in interstate commerce from the Southern District of New York to Lebanon, Pennsylvania. The second count made similar allegations as to petitioner Marco as to shipments from New York to Bluefield, West Virginia, beginning in June, 1953. The third count related to shipments to petitioner Karp in Fall River, Massachusetts, beginning May 21, 1953. The fourth count alleged conspiracy among the above named parties to transport such goods in interstate commerce (II-R. 5a-7a).

There was also an indictment alleging a conspiracy of the same parties to buy, receive and have in their possession stolen merchandise of the kinds above described (II-R. 8a-9a). The two cases were tried together, but at the conclusion of the government's case both conspiracy charges were dismissed (II-R. 11a).

Anthony and Mario Stracuzza pleaded guilty but had not been sentenced at the time of trial. Dorothy Stracuzza was granted a severance and the charges against her were dismissed after the trial (I-R. 12a-14a).

Since the sufficiency of the evidence to support the convictions is not in issue, we shall review the facts only insofar as is necessary for a discussion of the issues before the Court. Anthony Stracuzza was the principal government witness. In 1952 various truck drivers would bring in quantities of loose dresses and other apparel to the offices of Eisenberg and Berk, and later of Berk alone, where he worked. Anthony Stracuzza would change the tags on the merchandise and

make deliveries to different customers in the garment area. At various times he saw all the petitioners at the place of business where this operation was taking place, examining the merchandise and the accompanying manufacturers' invoices (Tr. 337-346). On one occasion, he saw Karp there with the two Schaffers (Tr. 347).[2] The Schaffers, sometimes one or the other, sometimes both, would come in every week or ten days (Tr. 368-369). Karp came in three or four times (Tr. 370).

In March, 1953, Anthony Stracuzza, assisted by his brother Mario, opened up his own place of business (Tr. 378-379). He successfully solicited the business of some of the former customers of Berk and Eisenberg, including the petitioners. He sold to the Schaffers at 65% of the manufacturer's invoice price, to Marco at 60% and to Karp at 55% (Tr. 395-399, 389-392). When forwarding merchandise to them, Anthony Stracuzza would enclose the manufacturer's invoice, which was the basis for the price to be paid, after obliterating or cutting out the name of the original consignee and the numbers at the bottom of the invoice (Tr. 402, 405-406). Anthony Stracuzza identified records and checks showing his transactions with the various petitioners (Tr. 408, 450-457). The transactions with Stracuzza form the basis of the indictment.

It was stipulated that the aggregate value of merchandise shipped to each petitioner exceeded $5,000, but that each individual shipment was of a value less than $5,000 (Tr. 1424, II-R. 21a).

---

[2] An F.B.I. agent testified to a conversation with Karp in which the latter told about Berk introducing him to the two Schaffers (Tr. 1153).

ARGUMENT

1. The fact that the conspiracy count was dismissed at the close of the government's case did not prevent the continuation of the trial on the substantive counts of the indictment.[3] The petitioners' argument that the conspiracy count was included in the indictment as a stratagem for the purpose of permitting an improper joinder (Pet. 11) is unwarranted. The evidence here presented the difficult problem of a conspiracy at the center (between the Stracuzzas) radiating in its dealings into separate spokes (represented by the petitioners). Since there was some evidence that the petitioners knew each other, the United States Attorney could well have believed that all the petitioners were part of a general scheme to deal in stolen goods.

Even though the trial judge found that one conspiracy had not been proved, he was fully justified in his conclusion, after the government's evidence was in, that the substantive case against each petitioner could, without prejudice to him, properly be submitted to the jury. This case does not present the problem of

---

[3] The petitioners contend that the trial court should have granted a severance when the conspiracy count was dismissed (Pet. 12). The only motion for a severance was made by the petitioner Karp before the trial, claiming that prejudice would result from the fact that co-defendant Anthony Stracuzza had pleaded guilty to a separate indictment and co-defendant Marco had a criminal record. This motion was denied, *United States* v. *Stracuzza*, 158 F. Supp. 522 (S.D. N.Y.). The defense motions at the close of the government's case were motions to dismiss (II-R. 11a). See *Kleven* v. *United States*, 240 F. 2d 270 (C. A. 8).

Delli Paoli v. *United States*, 352 U.S. 232, where an inculpatory statement of one defendant was admitted as against him, although it implicated another defendant as well. Here no "mental gymnastic" was necessary in order for the jury to follow the court's instructions to consider the evidence separately as to each defendant. The evidence as to each was clearly defined in its presentation and could hardly confuse the jury. There is no reason to assume that the jury disregarded the clear instructions of the court.

2. The statutory requirement that the stolen goods should have a minimum value of $5,000, value being defined as "the aggregate value of all goods * * * referred to in a single indictment",[4] was satisfied by the stipulation during the trial as to each of the petitioners, that "the aggregate value of the merchandise * * * which was transported * * * during the period * * * was in excess of $5000" (II-R. 21a; Tr. 1424).

The trial judge expressed doubts as to what the interpretation should be if an attempt were made to aggregate shipments to various individuals in order to make up the $5,000 (II-R. 16a), but no such problem is here presented, the stipulation being that more than $5,000 worth of merchandise was shipped to each individual petitioner.[5]

---

[4] 18 U.S.C. 2314 and 2311.

[5] Actual value of the shipments to the various petitioners, according to the calculation of the Court of Appeals, totaled $19,531.52 to the Schaffers, $17,175.24 to Karp and $23,080.14 to Marco (Pet. App. A-5).

The petitioners contend that a question should have been submitted to the jury whether the shipments to each petitioner were made as part of a single plan or agreement, as a prerequisite to aggregating the value of such shipments for jurisdictional purposes (Pet. 15). No such qualification is written in the statute, which provides that "the aggregate value of all goods * * * referred to in a single indictment shall constitute the value thereof." Of course, if several shipments relate to wholly unconnected schemes, an indictment combining such unrelated charges might be open to attack on a charge of duplicity or misjoinder. But no such attack was here made, although each of the substantive counts showed on its face that it covered shipments over a considerable period of time.

A consideration of the legislative history of the act shows that Congress contemplated that shipments which could be charged in one count or one indictment should be treated in the aggregate. The original "National Stolen Property Act" (48 Stat. 794), enacted in 1934, provided:

> *Sec. 5.* In the event that a defendant is charged in the same indictment with two or more violations of this Act, then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 hereof.

The purpose of requiring that the stolen property should be of a value of at least $5,000 was stated in House Report No. 1462 (73rd Cong. 2d Sess.):

> * * * There is added a provision which authorizes federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more.
>
> It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General.

In 1939, the statute was broadened to include embezzled property. House Report No. 422 (76th Cong., 1st Sess.) made the following comment as to the value requirement:

> It is to be noted, in this connection, that under the terms of section 5 of the act in the event the defendant is charged with a series of violations, the aggregate value of the property referred to in the indictment may be taken to make up the minimum valuation.

From these materials, it is apparent that there is no merit in the contention that the value of the shipments to each petitioner could not be aggregated. Indeed, even on the petitioners' theory that the shipments had to be pursuant to an initial agreement, no real problem is presented by the record in this case, for the evidence upon which the petitioners were found guilty admitted of no other possible interpretation. The shipments were made pursuant to previous agreements with the various peti-

tioners at a fixed discount from the price shown on the manufacturer's invoices.

3. One of defense counsel during the course of his summation commented on the failure of the government to call as witnesses Dorothy Stracuzza and Mario Stracuzza (I-R. 3a).[6] The court overruled a government objection to this argument and defense counsel spent considerable time on this point (I-R. 3a-6a). The United States Attorney answered this argument by pointing out that Dorothy was still a defendant. As to Mario, the government counsel said that he could have offered nothing additional because "if you will recall from the testimony of Agent Miller, both Stracuzzas were interviewed on each and every occasion by him, their story, their testimony, if you will, given to the F.B.I., was a joint story * * *" (I-R. 10a). He then quoted from an inscription in the Department of Justice building to the effect that the government wins when justice is done. He told the jury that, if they believed that the government had concealed the full truth, they should acquit the defendants (I-R. 11a).

There was no impropriety in this argument. There was no attempt on the part of the United States Attorney, as suggested, to indicate that he had knowledge of the case which went beyond the evidence introduced; his statements were based on facts of record and the testimony of the F.B.I. agent. Nor

[6] During the course of the trial the United States Attorney stated that he did not intend to call Mario Stracuzza as a witness and offered to give defense counsel his address (Tr. 1159).

was there any attempt to place his own integrity in the balance. It was an appropriate and restrained answer to a defense argument of doubtful propriety.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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Petitioners' Reply Memorandum.

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PETITIONERS' REPLY MEMORANDUM.

The nature of the arguments advanced in the Government's Brief in Opposition justify and indeed require a few words in reply.

First. These petitioners did not ask for a severance in advance of trial (2a; see *United States v. Stracuzza*, 158 F. Supp. 522, 524 (S. D. N. Y.)), nor have they ever contended that denial of their co-defendant's motion to sever was error while the conspiracy counts remained in the case.[1]

1. The government, in a footnote, (U. S. Br. 6) implies that no mention of the effect of the misjoinder was called to the attention of the trial court except by a pre-trial motion for severance and a motion to dismiss. This is clearly incorrect. Despite objections that it would be prejudicial to the petitioners to continue the trial on the substantive grounds only (13a-14a) the trial court ordered the case to go forward. The reliance of the government on *Kleven v. United States*,

Their position, simply stated, is that when the conspiracy counts were dismissed, there remained only three separate and unrelated accusations [2] against three separate sets of defendants, which as a matter of law could not simultaneously be considered by a single jury.

The Government cites no case authorizing such a mass trial of unrelated defendants, nor did the Court of Appeals (Pet. App. A11-A12); as we have shown (Pet. 11-12), the decisions relied on by the court below all involved either conspiracy counts that went to the jury or else some connection between the several accused at that juncture. In all of the Court of Appeals' authorities, there was a proper basis for joinder when the case went to the jury; here there was not.

The Court of Appeals said (Pet. App. A9), "Were it not for the conspiracy count, it would have been clearly erroneous to try the appellants together under Rule 8(b), Fed. R. Crim. P." Petitioners submit that, when the trial judge dismissed the conspiracy count, it was clearly erroneous to submit to the jury the cases of the petitioners together.

---

240 F. 2d 270 (C. A. 8) is misplaced. There, the defendants Klevens and Mantzold *jointly* participated "in the same series of acts or transactions constituting an offense or offenses" by receiving, concealing, buying and facilitating the importation of merchandise illegally imported.

2. The government incorrectly argues (U. S. Br. 6) that petitioners stated that, "the conspiracy count was included in the indictment as a stratagem for the purpose of permitting an improper joinder." We repeat, with emphasis, what we stated in our petition (Pet. 11): "The question comes down to whether the government *can claim the benefit* of improper joinder by the single stratagem of bracketing them with a conspiracy *so flimsy* that it fell far short of even getting to a jury." Neither the District Judge nor the Court of Appeals could find any evidence justifying the conspiracy count. The District Judge practically dismissed the conspiracy count on his own motion (11a-12a) declaring that the government had failed to "come anywheres close to the standard" of proof. The Court of Appeals in its opinion (Pet. App. A11) likewise stated: "and there is nothing in the record to indicate that any one of them knew of Stracuzza's dealings with the others."

No ruling of which we are aware justified that action, and this Court's decisions in *McElroy v. United States*, 164 U. S. 76, 81, and in *Kotteakos v. United States*, 328 U. S. 750, 772-774, are clear authority against it.

The Government defends the original inclusion of the conspiracy count in the indictment stating: "Since there was some evidence that the *petitioners knew each other*, the United States Attorney could well have believed that *all the petitioners* were part of a general scheme to deal in stolen goods" (U. S. Br. 6). [Emphasis supplied.] The Government is mistaken. There is no evidence that Schaffers knew Marco or that Marco knew Karp. And the only evidence that Schaffers "knew" Karp was an introduction. Not only does the Government have no standing to question the dismissal of the conspiracy count, it has no evidence to show that such dismissal was erroneous.

Second. In *Grunewald v. United States*, 352 U. S. 391, reversing the Second Circuit, this Court held that a conviction could not be sustained on appeal on a factual theory never submitted to or passed upon by the jury. But the present case presents an *a fortiori* situation, because here the basis for affirmance set forth in the opinion below (Pet. App. A7), that the evidence was sufficient to set forth a common plan giving the several shipments unity for purposes of the statute, was not alleged in the indictment; was not litigated at the trial (Tr. 765-766); and was not only not submitted to the jury but petitioners' specific requests that it be so submitted (Tr. 1611-1612, 1617-1618) were refused by the trial judge.[3]

---

3. For the convenience of the Court those requests are set forth here:

(a) *Request on Behalf of Max Schaffer* (Tr. 1611-1612).

"9. No violation of Section 2314 takes place unless the Government establishes beyond a reasonable doubt that the Defendant, Max Schaffer, transported or caused to be transported merchandise of a value of Five Thousand Dollars ($5,000),

In *Grunewald*, this Court reversed the Second Circuit's affirmance of a conviction because, "under the judge's charge, the convictions * * * might have rested on an impermissible ground" 353 U. S. 412. Here, however, the Second Circuit has affirmed convictions on a ground that was not only never submitted to the jury, but which was advisedly not so submitted despite a specific request for such submission made by these petitioners.

We argued this point at some length in our petition (Pet. 2 [Question 2], 9 [Second], 15-17). But the Government's only reply thereto is silence.

Third. Finally, petitioners raise the question whether, in the absence of a common plan—and on this record there was none, because the conspiracy count was dismissed, and the question of a plan *vel non* was never submitted to the jury—it is proper to aggregate [4] the value of separate ship-

knowing the same to have been stolen and converted. If the Jury finds that the shipments from on or about May 15, 1953 up to and including July 27, 1953, from the Southern District of New York to Lebanon, Pennsylvania, were entirely separate and distinct and were not in fact transported or caused to be transported by Max Schaffer, pursuant to a single plan or agreement with A. Schafler [Anthony Stracuzza's trade name], such shipments cannot be grouped for the purpose of establishing the value of Five Thousand Dollars ($5,000) as required by the statute and must find the Defendant, Max Schaffer, not guilty. *Andrews v. United States*, 108 F. 2d 511 at page 514.

"10. In order to group the shipments between on or about May 15, 1953, up to and including July 27, 1953, the Jury would have to find beyond a reasonable doubt that the shipments were transported pursuant to a single plan or agreement between Max Schaffer and A. Schafler and thus had unity of purpose. *Andrews v. United States*, 108 F. 2d 511 at page 514."

(b) Requests 8 and 9 on behalf of Norman Schaffer (Tr. 1617-1618) were, except for the difference in numbering and the difference in the name of the defendant concerned, identical with the requests on behalf of Max Schaffer which have just been quoted.

4. The curious feature of this prosecution is that the actual dealers in the stolen goods—the "fences"—completely escaped punishment: Anthony and Mario Stracuzza were given suspended sentences (69a), and the case against Dorothy Stracuzza was *nolle prossed* (4a). Yet the purpose of the legislation was "to protect interstate

ments under the National Property Act, 18 U. S. C. §§ 2314, 2311.

Up to now, the existence of a common plan has been deemed a prerequisite to any such aggregation, see *Andrews v. United States*, 108 F. 2d 511, 514 (C. A. 4); *Cartwright v. United States*, 146 F. 2d 133, 135 (C. A. 5), and the court below apparently agrees, because it spelled out a plan from the evidence although that issue was not submitted to the jury, and because it went on to say (Pet. App. A7), "We do not now decide what ruling should be made in a case where the transactions are truly 'separate and distinct.'"

On this issue the Government (U. S. Br. 7-10) either relies on the assertion that an agreement existed—although that issue was withheld from the jury—or else quotes legislative history. But the Government pointedly avoids discussing the authorities just cited, and equally pointedly avoids facing up to the heart of the problem of aggregating value in the absence of a plan: Where there is no plan, the first shipments with a value below the statutory limit are not criminal, but on the Government's theory they would become criminal retroactively by having added to them the value of the later shipments.

While petitioners believe that reversal is required under their first two points, the problem of the third one will arise if there is a retrial. It is moreover a recurring question and an obviously important one in the administration of the National Stolen Property Act.

---

commerce by going after the 'fence'." H. R. Rep. 1599, 73d Cong., 2d sess., p. 3. See also H. R. Rep. 2528, 70th Cong., 2d sess., at 2: "Of the many problems that confront those interested in the administration of criminal law, one of the most difficult to deal with has been the prosecution of the professional receiver and dealer in stolen, embezzled, or fraudulently obtained merchandise, who is usually known as the 'fence.' * * * To strike at the 'fence' * * * is striking at the very root of the evil."

This legislation was obviously not aimed at "purchasers" from the "fence." The usual strict rule in reading criminal statutes here forbids an interpretation that separate and distinct transportations by the purchasers of the "fence" are such "series of violations" that may be aggregated.

CONCLUSION.

For the foregoing additional reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF FOR THE PETITIONERS.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 104-118) is reported at 266 F. 2d 435. The memorandum opinion of the District Court relating to the motion for severance is reported at *United States v. Stracuzza*, 158 F. Supp. 522.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 21, 1959 (R. 119). Petition for rehearing was denied on May 14, 1959 (R. 119-120). The petition for a writ of certiorari was filed on June 11, 1959, and was granted on October 12, 1959 (R. 121), 361 U. S. 809. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether, after a conspiracy count against several defendants is dismissed for lack of evidence, it was here proper to continue the joint trial and submit to a jury the remaining substantive counts of the indictment charging each defendant with an independent and unrelated offense.

2. Where the District Court has plainly refused to submit an issue of fact to the jury for its determination, can the Court of Appeals properly affirm a conviction by making a finding on that issue of fact adversely to the defendants.

3. Whether the values of several separate and distinct transportations of stolen goods in interstate commerce may be aggregated to make up the $5000 or more value necessary to constitute an offense under 18 U. S. C. § 2314.

STATUTES AND RULES INVOLVED.

18 U. S. C. § 2 provides:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Section 2311 of Title 18, U. S. Code, provides in pertinent part as follows:

§ 2311. *Definitions*

As used in this chapter:

* * *

"Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

Section 2314 of Title 18, U. S. Code, as amended, provides:

§ 2314. *Transportation of stolen goods, securities, monies, or articles used in counterfeiting*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited secu-

rities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

Rule 8. Joinder of Offenses and of Defendants

* * *

(*b*) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

Rule 14. Relief From Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT.

There are set forth here only sufficient relevant facts to place in their proper setting the questions presented by these petitioners.

A. Summary of the Proceedings.

Petitioners Max and Norman Schaffer, father and son, were partners in a women's clothing store in Lebanon, Pennsylvania. In the course of several months in 1953, they made purchases of merchandise in New York City. Petitioners were indicted in the District Court for the Southern District of New York on October 10, 1954 for transporting in interstate commerce wearing apparel of a value in excess of $5,000, knowing that it had been stolen, in violation of 18 U. S. C. § 2314.

Petitioners were brought to trial with two other defendants, Marco and Karp, who had been indicted for similar offenses. Neither of these two other defendants —who are petitioners in No. 122, this Term—were connected with each other in any way, nor did they have any business relationship whatsoever with the Schaffers. Marco had purchased goods to be sent to Bluefield, West

Virginia. Karp had ordered goods to be shipped from New York City to Fall River, Massachusetts. In each of the cases, the buyers from West Virginia and Massachusetts purchased some of the goods from the same suppliers, the Stracuzzas, in New York, who sold goods to other customers in addition to the petitioners and Marco and Karp (R. 78-79).

The indictment submitted to the jury was originally in four counts. The first count alleged that during a period from May 15, 1953 to July 27, 1953, Max and Norman Schaffer, together with the Stracuzzas, knowingly transported and caused to be transported in interstate commerce, wearing apparel of a value in excess of $5,000, knowing the same to have been stolen, from the Southern District of New York to Lebanon, Pennsylvania, in violation of 18 U. S. C. § 2314.

The second count charged the Stracuzzas and Marco with making similar shipments from the Southern District of New York to Bluefield, West Virginia, from June 11, 1953 to July 27, 1953.

The third count charged the Stracuzzas and Karp with making similar shipments from the Southern District of New York to Fall River, Massachusetts from May 21, 1953 to July 21, 1953.

The fourth count charged all the defendants—the Stracuzzas, Max and Norman Schaffer, Marco and Karp—with conspiring (18 U. S. C. § 371) to violate 18 U. S. C. § 2314, by causing knowingly stolen goods to be transported in interstate commerce.

There was also a separate indictment alleging a conspiracy of the petitioners and the others to buy, receive, and have in their possession stolen merchandise.

Prior to the trial, the three persons implicated as the suppliers were removed from the case. Anthony

and Mario Stracuzza pleaded guilty to both indictments and both were awaiting sentence when the trial began. Anthony Stracuzza testified at length for the government. His wife's case was severed (R. 4, 10). Mario Stracuzza was not called by either side. These petitioners and Marco and Karp all pleaded not guilty and were all tried simultaneously in a single trial.

At the close of the prosecution's case, the District Court (Murphy, D. J.), essentially on his own motion (R. 11a), dismissed both conspiracy charges because of the failure of the government to come even close to proving a *prima facie* case.

Despite objections [1] that it would be prejudicial to the defendants to continue the trial on the remaining substantive counts, after the dismissal of the conspiracy count, the trial judge ordered the case to go forward as a joint trial, stating to counsel for petitioners:

> "What I am going to do now puts you in a most unique position. I am going to assume you are asking for a motion to dismiss counts 1, 2, 3 of Indictment 145-233, or for a directed verdict as to each of those counts, and I am going to reserve decision, *and you know from reading the cases that you put your case in at your peril, because it might develop to your disadvantage.*" (Italics supplied.)

and the three separate substantive counts were submitted simultaneously to the jury (R. 50a-64a). All the defendants were convicted.

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1. While the cited objection was made orally only by counsel for Karp, it had earlier been agreed, with the concurrence of the trial judge, that any objection taken on behalf of any defendant would inure to the benefit of all the defendants (R. 10a-11a, 63a).

These petitioners and Karp were each sentenced to two years' confinement and a $10,000 fine, while Marco was sentenced to four years' confinement and a similar $10,000 fine (R. 269a).

Anthony and Mario Stracuzza, the suppliers, were each given suspended sentences of five years (R. 269a). After the trial, the remaining indictment was nolle prossed as to Dorothy Stracuzza (R. 10).

On appeal by these petitioners and Marco and Karp, the Second Circuit affirmed the convictions and denied timely petitions for rehearing.

B. The Prosecution's Case.

The defendant Anthony Stracuzza dealt in stolen property, primarily clothing, from New York's garment district. During the periods alleged in the indictment, he was in business for himself, under the trade name of Schafler, rather similar to his wife's maiden name (R. 19). His brother, the defendant Mario Stracuzza, bought the merchandise from truck drivers—the actual thieves—while the defendant Dorothy Stracuzza, Anthony's wife, worked in the show room. According to the Government, the Stracuzzas received stolen merchandise in the aggregate of well in excess of $100,000, for which they paid the truck drivers between 33⅓% and 45% of the wholesale price and which they sold for from 50% to 70% of the wholesale price (R. 66a).

Between May 15, 1953 and July 27, 1953, petitioner Max Schaffer visited Anthony Stracuzza's showroom in New York about every week or ten days, sometimes in company with his son, petitioner Norman Schaffer, and sometimes alone. On these occasions, Max examined merchandise that Anthony Stracuzza showed him.

and ordered certain quantities to be sent to him. Anthony Stracuzza packed quantities of the stolen merchandise, and shipped it to Lebanon via an interstate packing and transport service.

It was stipulated (R. 21a) that no single shipment was of a value of $5000, that each shipment to these petitioners was of a value of less than that sum, but that the total of all the shipments made to them during the period alleged in Count I of the indictment exceeded $5000. The actual value of all of the goods shipped to these petitioners between May 15, 1953 and July 27, 1953, was $19,531.52 (R. 108).

C. Consideration and Disposition at the Trial of the Issue Whether Any Agreement United the Several Shipments.

The record shows that this case was not tried on the view, later espoused by the Court of Appeals (R. 110), that the separate shipments to these petitioners could be aggregated because petitioners had an agreement or "contemplated a number of transactions" with the supplier. Anthony Stracuzza, the Government's principal witness, testified, on cross-examination by counsel for these petitioners, that their purchases had been made by selection (R. 79):

> "Q. Very good. Now, the purchases made from A. Schafler by Max and Norman Schaffer were generally for merchandise that was selected by them on the premises; correct?
>
> "A. If they are there in person, they can select on the premises, yes.
>
> "Q. I asked you, Mr. Stracuzza, whether or not most of all of the purchases that they made from A. Schafler were purchases made by selection

by them on the premises themselves; isn't that true?

"A. Yes."

The record also shows that the case was not submitted to the jury on the theory of purchases pursuant to a standing agreement; see (R. 15a-17a), as follows:

"Mr. Steinberg (counsel for Karp): * * *

"But insofar as the element of $5,000, which your Honor has already given attention to, I strongly urge that there is no proof here that there was a single impulse, that there was the kind of activity which was referred to in the Andrews case,[2] so that they can be aggregated into one count to make up five thousand, as has been done here, and the proof is totally defective in that regard.

"The Court: Well, counsel are agreed that the aggregate value with regard to each defendant exceeds five, and you are also agreed that no shipment individually equalled five.

"Mr. Steinberg: Yes.

"The Court: That is correct.

"Mr. Steinberg: Yes. But if your Honor please, the fact that he received $5,000 worth of merchandise over a period, and that no shipment was of that value, would mean under the Andrews case that you have to find a certain mental operation there; isn't that so, your Honor?

"The Court: Well——

"Mr. Steinberg: A certain scheme, or, in other words, that it was shipped pursuant—in other

2. *Andrews v. United States*, 108 F. 2d 511 (C. A. 4).

words, suppose he said this: 'I am ordering $20,000. Ship it to me in four installments.'

"The Court: In the Andrews case it was a conspiracy count to start with; it wasn't a substantive count.

"Mr. Steinberg: Yes, but wouldn't you have to—I ask this not captiously—wouldn't you have to have something like that here to aggregate it, if your Honor please?

"The Court: Well, that is part of the problem, gentlemen, as to whether you can or cannot aggregate these shipments without proof of some sort of matter.

"Mr. Steinberg: I leave that with your Honor. You have given it the attention, and I thank you very much for the attention you have given it.

"The Court: Gentlemen, I can tell you that it bristles with questions on which I am not completely satisfied.

"What I have in mind, although I don't want to cut you off, is to give the case to the jury on the three substantive counts, and tell them that they have to find that the value—and I suppose they will almost have to find it pursuant to stipulation—that the aggregate value is over five, and you have to take an exception to that part of the charge, see what the jury does, and then we consider it again, because I am not too clear what the definition in 2311 really means, where it says you can group these values together if they are included in one indictment. I am inclined to believe that the one indictment means the one charge, so that it is three separate counts relating to the three groups of de-

fendants. I don't think you can take one indictment and charge 70 men and prove a thousand dollars for each one, and then say since the indictment totals $70,000 it comes within the statute. I don't know, and I would like you to work on some sort of a charge with regard to that one item, and I will charge it the way you want me to, Mr. Moran.

"Mr. Moran (Assistant U. S. Attorney): All right, sir.

"The Court: And see what happens.

"Mr. Steinberg: We will be glad to submit requests to charge on that point, so your Honor will have them before you.

"The Court: Yes.

"Mr. Steinberg: As an alternative.

"The Court: But in order to conform with the status of the case now, in order to give it to the jury. I have to assume that the jury can consolidate the amounts over this period of time."

* * *

"The Court: That is the way I will submit it to the jury on that issue, so in effect your case should be devoted, I assume, to your guilty knowledge, and the question whether the goods were stolen."

The Government then submitted a requested charge on aggregating the value of the several shipments that made no mention of conspiracy, of agreement, or of course of conduct, but relied exclusively on the statutory definition of principals, 18 U. S. C. § 2; see Government's Request No. 2 (R. 100):

"The indictment charges that each of the defendants transported and caused to be transported in interstate commerce merchandise of value in excess of $5,000. In order to sustain a conviction, the Government is not required to establish that any of the defendants personally transported the merchandise alleged to have been stolen.

"It is sufficient if you find that each defendant aided and abetted the transportation of the merchandise by Stracuzza and thus caused such to be transported in interstate commerce.

"A defendant, if the evidence supports the charge, may be held as principal under a federal law, generally referred to as the Aiding and Abetting section, which reads:

> 'Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever wilfully accuses an act to be done, which if directly performed by him or another would be an offense against the United States, is punishable as a principal.'"

Both of the present petitioners requested instructions that would have required the jury to find, as a prerequisite to conviction, that the shipments to the Schaffers were made "pursuant to a single plan or agreement" and that the shipments "thus had unity of purpose." Here are the relevant instructions submitted to the Trial Judge on behalf of the petitioner Max Schaffer (R. 101).

"9. No violation of Section 2314 takes place unless the Government establishes beyond a reasonable doubt that the defendant, Max Schaffer, transported or caused to be transported merchandise of a value of Five Thousand Dollars ($5,000) knowing the same to have been stolen and converted. If the Jury finds that the shipments from on or about May 15, 1953, up to and including July 27, 1953, from the Southern District of New York to Lebanon, Pennsylvania, were entirely separate and distinct and were not in fact transported or caused to be transported by Max Schaffer, pursuant to a single plan or agreement with A. Schafler, such shipments cannot be grouped for the purpose of establishing the value of Five Thousand Dollars ($5,000), as required by the statute and must find the Defendant, Max Schaffer, not guilty. *Andrews v. United States*, 108 F. 2d 511 at page 514.

"10. In order to group the shipments between on or about May 15, 1953, up to and including July 27, 1953, the Jury would have to find beyond a reasonable doubt that the shipments were transported pursuant to a single plan or agreement between Max Schaffer and A. Schafler and thus had unity of purpose. *Andrews v. United States*, 108 F. 2d 511 at page 514."[3]

The trial judge refused to charge the jury on the issue presented by the above requests for charge.

3. Requests 8 and 9 on behalf of the petitioner Norman Schaffer (R. 102) were, except for the difference in numbering and the difference in the name of the defendant concerned, identical with the requests of the petitioner Max Schaffer quoted in the text. Motions for judgments of acquittal on the basis that there was a failure to establish the jurisdictional amount were also made by the petitioners and denied (R. 21a, 64a, 65a).

The instructions referred to the stipulation of the attorneys as establishing that the total value of shipments in each count exceeded $5000. The jury was told to "rely" on that stipulation, even though no individual shipment was of a $5000 value (R. 58a). This was in accordance with the requested charge submitted by the Government, which made no mention of conspiracy or agreement or course of conduct or aggregating the value of the several shipments. See Government Request No. 2, *supra*, p. 13.

Exceptions were duly made to the failure of the judge to give the instructions requested by the petitioners (R. 63a).

D. The Opinion Below.

The Court of Appeals affirmed these petitioners' convictions on two basic grounds.

First, the court below held that it was not necessary to decide whether it would be proper to aggregate the value of the separate shipments "in a case where the transactions are truly 'separate and distinct,' " because "Here * * * it is perfectly clear that the shipments with respect to each appellant were not 'separate and distinct' ", and that the petitioners, in negotiating with the suppliers, "contemplated a number of transactions" (R. 110).

Second, the court below held that although in view of Rule 8(b), F. R. Crim. P., it would have been clearly erroneous to try the defendants together in the absence of a conspiracy count, the presence of the conspiracy count, not shown to have been added by the prosecution in bad faith, sufficed to make the joinder proper, even though the conspiracy allegation was dismissed at the close of the Government's case. The court below

held that there was no prejudice resulting from the simultaneous submission to the jury of the three substantive counts against these different defendants, because of the trial judge's repeated admonitions—over fifty in number (R. 113)—to the jury during the trial not to consider evidence admitted with respect to one defendant against any of the others, as well as the cautionary instructions in the charge.

These petitioners sought a rehearing, pointing out *inter alia*, that their convictions had been sustained on a finding of fact by the appellate court rather than by the jury, and that the finding made by the Court of Appeals was on the precise issue which petitioners requested to have submitted to the jury and on which the District Court refused to charge. Rehearing was denied.

SUMMARY OF ARGUMENT.

I. Once the conspiracy counts were dismissed at the close of the prosecution's case, it was wholly improper to submit to the jury simultaneously the three remaining substantive counts against these petitioners and the two other defendants, Marco and Karp, who are petitioners in No. 122, this Term, because there was no common participation "in the same act or transaction constituting an offense" which is a pre-requisite to joinder. Such a joinder at that point could not be cured by any number of limiting cautionary instructions in the charge after a trial on conspiracy charges, and trial counsel made a very specific objection to the continuation of the trial in those circumstances.

The court below conceded that, absent the conspiracy counts, it would have been erroneous to try the several defendants together under Rule 8(b) of the

Fed. R. Crim. P. The same rule applies where the conspiracy counts were dismissed prior to submission of the case to the jury, for, after all, each count is to be considered as though it were a wholly separate indictment. *E.g., Dunn v. United States*, 284 U. S. 390, 393. Here, therefore, there were submitted to a single jury at the same time three separate indictments against three separate defendants unrelated to each other.

No authority supports the conclusion of the court below that it was proper to submit the unrelated substantive counts to the jury simultaneously after the link which bound the several defendants to each other —the conspiracy counts—had been dismissed; and *Kotteakos v. United States*, 328 U. S. 750, and *McElroy v. United States*, 164 U. S. 76, are strong and indeed conclusive authorities against what was done here.

This is not a situation where the proof against several defendants being tried together was properly submitted to the jury in the sense of Rule 8(b), F. R. Crim. P., and the appellate question went only to the sufficiency of the cautionary instructions. Every one of the eleven cases relied on by the court below was of that character. None involved the present situation, of unconnected charges against unrelated defendants simultaneously submitted to a single jury. Hence none of the cases cited in the opinion below are even remotely in point.

If specific prejudice need be shown, then the present record amply supports the danger of transference of guilt in mass trials to which this Court adverted in *Kotteakos*, 328 U. S. at 774.

The Court of Appeals relied principally upon the more than fifty admonitions to the jury during the trial

by the trial judge not to consider evidence admitted with respect to one defendant against any of the other defendants, as well as the cautionary instructions in the charge, as proof of the lack of such prejudice. The mere fact that so many instructions were here necessary is itself the best evidence that each defendant unnecessarily suffered because they were tried together.

Testimony at the trial, the prosecutor's summing up, and the judge's charge show, inescapably, that what each individual defendant was shown to have done bore on what all of the other defendants were charged with doing.

This naturally comes about since in a conspiracy trial declarations and acts by one co-conspirator committed in furtherance of the conspiracy and during its pendency are admissible against each co-conspirator. Courts admit evidence under this rule subject to instruction to disregard it against all but the declarant if it turns out there is no connection.

It is quite clear that where there is no basis to support the conspiracy charge, and the prosecutor has bracketed it with three substantive counts dealing with unconnected offenses involving different defendants, a great deal of evidence has been let in which, if there had been no conspiracy charged, would not have been admissible. When people conspire they invite mass trial by their conduct. When people do not conspire they should not be tried together in a common trial as co-conspirators.

II: It was improper for the court below to sustain the convictions on appeal by deciding against petitioners a vital factual issue which the trial judge refused to submit to the jury at the trial.

Here, as in *Grunewald v. United States*, 353 U. S. 391, reversing *United States v. Grunewald*, 233 F. 2d 556 (C. A. 2), the court of appeals has sustained a conviction on a theory of facts never submitted to nor passed upon by the jury. But the present case actually presents an *a fortiori* situation, because here the basis for affirmance set forth in the Court's opinion was not alleged in the substantive counts submitted to the jury, was not litigated at the trial, and was not only not submitted to the jury but appellants' specific request that it be so submitted was refused by the trial judge.

Petitioners were found guilty in the District Court on the theory of the statute that the values of *separate and distinct* transportations of goods may be aggregated. The instructions to the jury directed them to rely on the stipulation of the attorneys (R. 58a) as establishing the value of the goods for purposes of the definition of the offense (R. 58a). Instructions submitted by the petitioners, to charge the jury that they must find that several transportations had been made according to a single plan or agreement before aggregating the value of each transportation were refused by the trial court (R. 101, 102). The District Court deliberately refused to permit any jury consideration in this case of such a question of fact.

To sustain the convictions arrived at, it would be necessary to uphold the trial judge's interpretation that the statute permits aggregation of separate and distinct transactions. But the court below refused to affirm the convictions on the case as tried.

The theory on which the court below sustained petitioners' convictions was that aggregation was permitted of the shipments since "the proofs disclosed as to each appellant a sufficient 'unity for the purpose of the

statute' " and that now "no ruling should be made in a case where the transactions are truly 'separate and distinct' ".

Even the Government's brief, filed in the Court of Appeals, made no attempt to sustain the conviction on the theory of the trial court. The Government's position there was that "the shipments of stolen goods that were aggregated in this case were related in such a way that they had, in the words of Judge Parker in *Andrews v. United States, supra*, 'unity for the purposes of the statute' " (Government's Brief, p. 37).

It is clear that the court below affirmed the convictions by making that *finding of fact*, which the lower court had refused to permit the jury to make.

We are not aware of any other instance where a conviction has been affirmed by an appellate court on defendants' theory, not submitted to the jury, where the defendants themselves expressly urged that their guilt or innocence be determined on that precise theory. In addition, petitioners' convictions on this record have been affirmed on a theory that was never alleged in the count on which they were tried. This is, therefore, a stronger case against affirmance than *Grunewald* and accordingly requires a reversal.

III. Petitioners were found guilty of violating a statute which makes it a federal offense to transport in interstate commerce goods valued in excess of $5,000. A shipment of goods worth less than $5,000 is plainly outside the scope of the federal statute. Petitioners were implicated in several separate shipments, each involving goods worth less than the statutory minimum. They were nonetheless convicted in the District Court on an interpretation of the statute which permits aggre-

gation of totally separate and distinct transactions in order to reach the statutory minimum.

The Government has cited no authority for this interpretation, which we contend is clearly erroneous. In the Court of Appeals, the Government itself completely abandoned this theory and, not surprisingly, that court did not affirm on this theory.

The plain language of Section 2314 of the National Stolen Property Act makes it a federal crime knowingly to transport in interstate commerce stolen "goods, wares, merchandise, securities or money of the value of $5,000 or more." Transportation of goods worth less than that amount clearly would not constitute a federal crime.

This plain meaning is fortified by an examination of the entire statute, the legislative purpose and history, contemporaneous decisions of several courts of appeals at the time the statute was re-enacted, and by the accepted rules of statutory interpretation teaching that criminal statutes must not be extended beyond the clear scope of their language.

In the District Court, the Government relied upon 18 U. S. C. § 2311 for the proposition that independent transactions could be aggregated to establish the jurisdictional minimum value. That section states that the "aggregate value of all goods . . . referred to in a single indictment shall constitute the value thereof."

The language of this section is, to say the least, less than lucid. Legislative history strongly supports the view that aggregation is permissible only if the several transactions are the carrying out of a single plan or conspiracy. Repeatedly, the legislative materials explaining the incorporation of the clause permitting aggregation refer to a "series of transactions"

or a "series of violations." The word "series" denotes a succession of events having some connection or coordination, conforming to some overall plan. It is hardly in keeping with the random concept inherent in the theory of the statute under which petitioners were convicted.

The Court of Appeals for the Fourth Circuit decided in 1939 that ". . . transactions which are entirely separate and distinct cannot be grouped for the purpose of establishing a value within the statute, [but] they may be considered together where they are not separate and distinct but are the carrying out of a single plan or conspiracy." *Andrews v. United States*, 108 F. 2d 511, 514 (C. A. 4). This decision, persuasive authority in itself for the proper reading of the statute, cannot be said to have been rejected by Congress when it enacted the 1948 edition of the Criminal Code.

The most compelling witness to the error in the "separate and distinct" theory is the chariness of the Government to stand on the position taken, at its behest, by the District Court. In neither the Court of Appeals nor the Brief in Opposition to the Petition for Certiorari did the Government make the slightest effort to support the convictions on the case as tried. Quite the contrary, they have urged that these convictions should be affirmed on the precise theory of the statute under which petitioners sought, without avail, to be tried in the District Court. Remarkably enough, the Government has so far succeeded. Should the Government persist in this position, plainly the petitioners are entitled to have their convictions reversed and a new trial on the theory the Government now embraces.

ARGUMENT.

I. Once the Conspiracy Counts Were Dismissed, It Was Wholly Improper to Submit to the Jury Simultaneously the Unrelated Substantive Counts Against These Petitioners; Against Marco, and Against Karp.

At the close of the prosecution's case, the trial judge stated that "I am very much concerned about the conspiracy counts" (R. 11a), and asked for argument from the prosecutor "as to what you think the proof is on both conspiracy counts" (*id.*).

After such argument, the trial judge dismissed both conspiracy counts, Indictment No. 145-233 in its entirety, and Count 4 of Indictment No. 145-232 (*id.*), saying (R. 12a), "I don't think you have come anywheres close to the standard that you have to prove, either as to whether or not there were three separate conspiracies or just a general conspiracy."

At that juncture, with the conspiracy counts out of the case, the nexus linking the three substantive counts vanished. Count 1 (R. 5a) charged a substantive violation by these petitioners and the Stracuzzas, Count 2 (R. 5a) a substantive violation by Marco and the Stracuzzas, and Count 3 (R. 5a), another substantive violation by Karp and the Stracuzzas. At that juncture, therefore, three separate defendants were together on trial—and for the purpose of the discussion that follows, we treat the petitioners Schaffer as a single defendant, to obviate repeated verbal qualifications that do not vary the substance—three separate defendants were on trial, for three different offenses, offenses that were related only by the circumstance that each defendant had bought goods from the Stracuzzas.

It is petitioners' position that this was an improper trial incapable of cure by any amount of limiting instructions, no matter how often repeated.

1. Preliminarily, we should note that counsel made very specific objection to continuing the trial after dismissal of the conspiracy counts (R. 14a), a matter overlooked by the Government's suggestion (Br. Op. 6) that the effect of the misjoinder was never called to the attention of the trial court except by a pretrial motion for severance and a motion to dismiss.[4]

Objection to continuance of the trial having plainly been made, cf. Rule 51, F. R. Crim. P., counsel were not required to argue the same point thereafter; and it had earlier been stipulated with the consent of the court that objections made on behalf of one defendant would inure to the benefit of all (R. 10a).

Moreover, we think it equally plain that counsel's expressed satisfaction with the charge as given (R. 62a)—subject to the exception as to aggregating the value of the several shipments in the absence of a common plan or agreement (R. 63a)—did not amount to a waiver of the earlier specific objection to a common trial of unrelated accusations against unrelated defendants. The apparent intimation to the contrary in the opinion below (R. 113) on this point cannot, with all deference, be taken seriously.

2. With these preliminaries disposed of, we turn to the merits.

The court below conceded (R. 112) that "were it not for the conspiracy count, it would have been

4. We should also note that the Government's reliance (Br. Op. 6, n. 1) on *Kleven v. United States*, 240 F. 2d 270 (C. A. 8), is misplaced, since there the two defendants concerned were charged with joint participation in the same series of acts or transactions.

erroneous to try the appellants together under Rule 8(b), Fed. R. Crim. P. (*supra*, p. 4), for there would be no common participation 'in the same act or transaction constituting an offense' which is a requisite to joinder," citing, *inter alia*, *Kotteakos v. United States*, 328 U. S. 750.

Petitioners submit that, once the conspiracy counts were dismissed before the case was submitted to the jury, the principle just quoted from the opinion applied, and rendered equally erroneous the submission together of what remained in the case. Because, after all, each count in an indictment is to be considered as though it were a wholly separate indictment. *Dunn v. United States*, 284 U. S. 390, 393; *Selvester v. United States*, 170 U. S. 262. Consequently what was done here was to submit to a single jury, simultaneously, three separate indictments against three separate defendants unrelated to each other. That is to say, the trial judge permitted, and the court below sanctioned, a mass trial, with all of its concomitant opportunities for transference of guilt because of the association.

3. In the pretrial denial of the petitioner Karp's motion for a severance, *United States v. Stracuzza*, 158 F. Supp. 522 (S. D. N. Y.), the prosecutor's affidavit in opposition to that motion said, *inter alia*, that (103) "Information available to the Government indicates * * * that the defendants Max Schaffer, Norman Schaffer, Hyman Karp and Benjamin T. Marco were known to one another." On that sworn statement, and with Count IV alleging a conspiracy still included in Indictment No. 145-232, denial of the motion was proper, as these petitioners conceded below (Schaffer Br., C. A. 2, p. 18).

But at the trial the proof adduced by the prosecution failed to "come anywheres close to the standard that you have to prove" (R. 12a), and the court below conceded (R. 114) that there was nothing in the record to indicate that any petitioner knew of the Stracuzzas' dealings with the other petitioners.[5] Moreover, even if the proof were far stronger than it actually was, no appeal lies from the dismissal of the conspiracy counts, and hence it does not make for clarity of analysis for the Government inferentially (*e. g.*, Br. Op. 6) to suggest that there may well have been a conspiracy nonetheless.

4. The court below said (R. 113):

> "*The mere fact the conspiracy count is dismissed at the close of the evidence by the trial judge,* or that a verdict of acquittal on that count is returned by the jury, *does not establish as matter of law that it was error to submit the substantive charges to the jury.*"

We have added the italics to indicate the scope of our disagreement; the emphasized clauses are plainly in conflict with this Court's rulings, of which *Kotteakos v. United States*, 328 U. S. 750, is simply the latest.

There an indictment charged numerous defendants with a single conspiracy. At the trial the evidence showed that there were at least eight separate conspira-

5. In *United States v. Haupt*, 136 F. 2d 661, 674 (C. A. 7), the Court stated: "We think that if these facts had been known to the Trial Court at the time the motion for severance was made, it would have been an abuse of discretion for the Trial Court to have refused a severance. When presented again in the motion for a new trial and all of these facts and circumstances were known to the Court, it was likewise an abuse of discretion to overrule such a motion and thus refuse to remedy this prejudicial procedure."

ies, none of which had any connection with each other, although all the conspirators separately dealt with the central figure. The Supreme Court held that reversal was required, saying (328 U. S. at 772-774):

"Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together, or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

"Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. * * *

"Here toleration went too far. We do not think that either Congress, when it enacted § 269,[6] or this Court, when deciding the *Berger* case,[7] in-

6. Of the Judicial Code, 28 U. S. C. [1926 to 1946 eds.] § 391, the harmless error statute, repealed in 1948. The current provision is Rule 52(a), F. R. Crim. P.

7. *Berger v. United States*, 295 U. S. 78.

> tended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all: * * * The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place."

The factual situation here is very similar to that in *Kotteakos;* the Schaffers, Marco, and Karp all dealt with Stracuzza, but none of the first three had any connection with each other. But we have here an *a fortiori* case, because while in *Kotteakos* there was an allegation and a finding that all of the petitioners had conspired with Simon Brown, the central figure there, here every allegation of conspiracy with the central figure Stracuzza was eliminated before the case went to the jury.

In this aspect, *Kotteakos* did not in any sense break new ground; just half a century earlier, this Court had expressed the same principle in *McElroy v. United States,* 164 U. S. 76, 81:

> "While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in nowise parts of the same transaction and

must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

The present case did not involve a conspiracy count duly submitted on which acquittal resulted; no conspiracy count ever went to the jury. Hence there is involved here only the submission to the same jury at the same time of separate substantive charges against separate defendants—actually, under the rule of count-equals-indictment (*supra*, p. 25), of three separate indictments against defendants unconnected one with the other.

Neither the court below in its opinion nor the Government here in opposition to our petition for certiorari cited any authority in support of the rulings below on that proposition—for the obvious reason that no such authority is available. No decision (other than the one now under review) supports the grossly improper practice of the trial here involved, and such cases as have been found on so plain a principle are, not at all surprisingly, to the contrary.

The commission by different defendants of distinct and separate offenses, not arising out of the same transaction, cannot be made the subject of a single indictment or of a common trial. *United States v. Harvick*, 153 F. Supp. 696 (D. N. Dak.); *United States v. Welsh*, 15 F. R. D. 189 (D. D. C.); *Coco v. United States*, 289 Fed. 33 (C. A. 8); *United States v. Geare*, 293 Fed. 997

(App. D. C.). As one of the draftsmen of the Federal Rules of Criminal Procedure said in *United States v. Welsh, supra*, 15 F. R. D. at 190,

> "* * * different unconnected offenses not arising out of the same series of transactions may not be joined in an indictment in which two or more defendants are charged. There is a good reason for that restriction. This is no technical limitation. The purpose is to prevent mass trials."

Indeed, not even the most speculative discussion has ever admitted the validity of the kind of joinder that was sanctioned here. See *United States v. Dietrich*, 126 Fed. 664, 670 (D. Neb.).

5. This is not a situation where the proof against several defendants being tried together was properly submitted to the jury in the sense of Rule 8(b), F. R. Crim. P., and the question on appeal concerned only the sufficiency of the cautionary instructions.

Not a single one of the eleven cases cited in the opinion of the court below (R. 114) dealt with the situation now presented here, where no conspiracy count ever went to the jury, and where three substantive counts each directed at a different defendant were simultaneously submitted in the absence of any question of conspiracy to supply a link between three unrelated counts each naming a different and unrelated defendant.

(a) In eight of the eleven cases cited in the opinion below, a conspiracy count had been submitted to the jury.

(1) *Delli Paoli v. United States*, 352 U. S. 232.
(2) *Opper v. United States*, 348 U. S. 84.
(3) *Blumenthal v. United States*, 332 U. S. 539.
(4) *Berger v. United States*, 295 U. S. 78.
(5) *United States v. Bando*, 244 F. 2d 833 (C. A. 2).
(6) *United States v. Chieppa*, 241 F. 2d 635 (C. A. 2).
(7) *United States v. Lebron*, 222 F. 2d 531 (C. A. 2).
(8) *United States v. Nash*, 54 F. 2d 1006 (C. A. 2).[8]

(b) In two more of the eleven cases cited in the opinion below, several defendants were jointly charged in at least one of the counts submitted to the jury.

(9) *United States v. Leviton*, 193 F. 2d 848 (C. A. 2).
(10) *Robinson v. United States*, 210 F. 2d 29 (D. C. Cir.).

(c) In the final case cited in the opinion below, a single defendant was tried on several indictments each of which charged similar offenses.

(11) *Dunaway v. United States*, 205 F. 2d 23 (D. C. Cir.).

Otherwise stated, not a single one of the eleven cases relied on by the court below is even remotely in point.

8. For more complete details of the *Nash* case, see the ruling there in the District Court. *United States v. Nash*, 51 F. 2d 253 (S. D. N. Y.).

6. Even in a simple conspiracy trial, uncomplicated by additional counts alleging substantive offenses, the admission of evidence against one conspirator that is plainly inadmissible against the others raises grave questions, notwithstanding the giving of full cautionary instructions. See *Delli Paoli v. United States*, 352 U. S. 232. Where protection of defendants would require abolition of conspiracy, as a crime, the courts have accepted the fiction of the effectiveness of the instructions to permit the continued existence *vel non* of the offense of conspiracy. But the holding in *Delli Paoli* does not and cannot justify what was done here, where there was no connection whatever between the several defendants—one in Pennsylvania, one in southernmost West Virginia, and one in southeastern Massachusetts—when the jury proceeded to deliberate on the guilt or innocence of all at the same time. No difficult choice is involved in this case since there is no reason for extending this policy beyond the circumstances which gave rise to it.

When the prosecutor added a count for conspiracy, it obviously placed the petitioners, in a case like this, in some difficulty. The reason is that it rendered admissible evidence of what Stracuzza, the chief Government witness, a co-defendant, said in the absence of the others, because if they are all co-conspirators, what one of them said in furtherance of the conspiracy would be admissible evidence. Not only did Stracuzza testify at this trial to the conversations and transactions that he had with Marco and Karp, but other Government witnesses testified as to what Stracuzza told them about his conversations and transactions between Marco and Karp, and Government witnesses also testified to the conversations that they themselves had with Marco and Karp.

Under these circumstances the admonition of the trial judge to the jury, at the end of the sixteen day trial (R. 19a, 20a) ". . . that the various exhibits and testimony that I admitted against one defendant *subject to connection* against the others is *now* admitted only against that particular defendant that the exhibit referred to or the testimony referred to" (italics added), is utterly incapable of fulfillment by twelve ordinary mortals. Even an IBM machine would have trouble.

7. The trial court recognized that the petitioners, after the government's case was concluded, could only put their case in "at your peril" (*supra* p. 7). It would have been perilous and literally impossible for each "particular defendant" to testify and produce witnesses in his behalf without conflicting with the defenses of the other defendants or diluting his own defense. Each defendant was admittedly entitled to present his defense in his own way without having "his" jury listen to the examination and cross-examination of the other defendants in the case who were no longer co-defendants even in name.

8. But if additional specific prejudice need be shown, if it be deemed necessary to further document the truism in *Kotteakos,* 328 U. S. at 774, quoted at pp. 27, 28 above, regarding the dangers of transference of guilt, such a showing can easily be made here.

(a) The admonitions of the trial judge not to consider evidence affecting only one defendant against either of the other two, no matter how often repeated, could not separate into three separate prosecutions what in actual fact was a single prosecution incapable of division into its constituent parts. It is only necessary to read the prosecutor's summing up (R. 22a-49a)

and the judge's charge (R. 50a-64a) to see how, inescapably, what each defendant was shown to have done bore on what the other defendants were charged with doing. Even the judge necessarily lumped all the defendants together at one important portion of his charge. He said (R. 55a):

> "For example, as against all the defendants, it says that the manufacturers' invoices, which Stracuzza says were included in the shipments were an obvious indication that the goods were stolen, because of the manner in which they were obliterated or torn; also, that the prices that the defendants paid were so out of proportion to the true market value, and that the copying of the style numbers from the manufacturer's invoice was a further indication.
>
> "It says, as to those defendants who were actually in the premises of Stracuzza, they must have known or at least should have known from the condition of the premises and the manner of the display of the goods that they were not legitimate, but stolen."

(b) According to the opinion below (R. 106), "The substantive counts went to the jury, the principal issue being whether or not each defendant knew that the goods he received from the Stracuzzas was stolen."

In its discussion of the evidence on that issue (R. 116), the court below lumped together evidence relating to Marco alone ("what were claimed to be humorous remarks by Marco to the effect that the goods were stolen," and testimony of a Marco employee as to altering labels); evidence relating to Karp alone (his dealings in other stolen property and his telephone call to

Stracuzza about protection); and evidence relating to Max Schaffer alone (a motion picture showing him in the Stracuzzas' showroom).

Anthony Stracuzza, the prosecution's principal witness, testified that he did not tell any of the defendants that the goods were stolen (R. 55a). The prosecution was therefore required to prove guilty knowledge on the part of each one. Plainly enough, the admission in a common trial of any of the items just mentioned would on that issue effectively prejudice petitioner Norman Schaffer, while the admission of the items relating to Marco and Karp would similarly prejudice petitioner Max Schaffer.

Accordingly, where the charge is an actual commission of a crime, prosecutors should not be permitted to add an additional count of conspiracy and receive the windfall of prejudicial inadmissible evidence where, after the Government's case is concluded, even a *prima facie* case of conspiracy has not been made out.

II. It Was Improper for the Court Below to Sustain the Conviction on Appeal by Deciding Against Petitioners a Factual Issue Which They Had Unsuccessfully Sought to Have Submitted to the Jury at the Trial.

Here, as in *Grunewald v. United States*, 353 U. S. 391, reversing *United States v. Grunewald*, 233 F. 2d 556 (C. A. 2), the Second Circuit has sustained a conviction on a factual theory never submitted to nor passed upon by the jury. (Interestingly enough, the judge who wrote the opinion below in this case also wrote for the Second Circuit in *Grunewald*.) But the present case actually presents an aggravated instance of the error committed below in *Grunewald*, because

here the basis for the Court of Appeals' affirmance was not alleged in the indictment; was never litigated at the trial; and was not only not submitted to the jury but these petitioners' specific requests that it be so submitted were totally denied by the trial judge.

1. In *Grunewald*, where this Court reversed because the theory on which the Court of Appeals sustained that conviction had not been submitted to the jury (Point II, 353 U. S. at 406-415), "The indictment was clearly sufficient to cover submission of this theory to the jury." 353 U. S. at 408, note 21.

Here, on the other hand, the only allegation affecting these petitioners that went to the jury, Count 1 of Indictment C-145-232 (R. 5a), did not allege that the several shipments made to them were made pursuant to an agreement or pursuant to a conspiracy. And every allegation of conspiracy naming these petitioners —Count 4 of Indictment C-145-232 (R. 6a) and the conspiracy indictment, No. C-145-233 (R. 8a-9a)—had been dismissed before submission of the case (R. 11a).[9]

Accordingly, petitioners' convictions on this record have been affirmed on a theory[10] that was never alleged in the indictment on which the jury deliberated. The result is that, as we have said before, this is therefore a stronger case for reversal than *Grunewald* was. Indeed, the situation runs afoul of the condemnation of *Cole v. Arkansas*, 333 U. S. 196, 201, that "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never

9. In *Lile v. United States*, 264 F. 2d 278 (C. A. 9), the indictment alleged a conspiracy to violate 18 U. S. C. § 2314. In *Andrews v. United States*, 108 F. 2d 511 (C. A. 4), the defendants were similarly charged with conspiracy to violate the predecessor provision. No substantive violations were in issue in either case.

10. *United States v. Gordon*, 253 F. 2d 177, 181 (C. A. 7).

tried as it would be to convict him upon a charge that was never made. *De Jonge v. Oregon*, 299 U. S. 353, 362." Here again, that was no innovation. "The rule that a man shall not be charged with one crime and convicted of another" was first formulated by Chief Justice Marshall. *Schooner Hoppet v. United States*, 7 Cranch 389, 394.

2. As the extract from Anthony Stracuzza's testimony shows (R. 79; *supra*, pp. 9, 10), no issue as to agreement *vel non* was litigated at the trial.

3. And, very plainly, the case was not submitted to the jury on the theory of purchases pursuant to an agreement; see the colloquy at R. 15a-17a (*supra*, pp. 10-12); the Government's request on aggregation of value (R. 100; *supra*, pp. 12-13); and the judge's charge on aggregation of value (R. 58a; *supra*, pp. 13-14).

To the contrary, the requests of these petitioners (Max Schaffer requests 9 and 10, R. 101; *supra*, p. 13; Norman Schaffer requests 8 and 9, R. 102) that the case be so submitted, that the jury should be instructed not to convict unless they found that the shipments were made "pursuant to a single plan or agreement" and that the shipments "thus had unity of purpose," were refused; and exception to such refusal was duly saved (R. 63a).

4. It is crystal clear from the opinion that the court below affirmed petitioners' conviction by making the precise finding of fact which the trial judge had refused to permit the jury to consider. Here is what the Second Circuit said (R. 110):

"We need not now decide what ruling should be made in a case where the transactions are truly 'separate and distinct.' Much may depend upon the facts of a particular case. Here, however, it is perfectly clear that the shipments with respect to each appellant were not 'separate and distinct.' Although the overall conspiracy between the Stracuzzas and the four appellants was not established, the proofs disclose as to each appellant a sufficient 'unity for the purpose of the statute.' All goods acquired by each appellant were acquired from the same distributor, Tony Stracuzza; all goods were acquired at the same discount according to a prearranged agreement; all shipments included within the indictment as to each appellant were concentrated within a specified time of no more than two and one-half months; each shipment had the same origin and destination; the merchandise shipped was all of the same type, ladies' and children's wear; and each appellant in negotiating with the Stracuzzas contemplated a number of transactions."

We disagree sharply with the factual conclusion drawn in the foregoing passage,[11] but that is beside the

11. The facts in this case clearly show that the transportations which actually took place to these petitioners were not the result of a definite standing agreement to purchase and transport these goods in the amount of $5000 or more. Each transportation was the result of a new and separate selection and purchase of different merchandise not pursuant to any previous agreement except for what the discount would be in the event of a purchase, and how the shipment would be made. The court below stated that the petitioners "contemplated a number of purchases" (R. 110). But there is a legal world of difference between contemplating a purchase and an agreement to purchase. Yet if we err in our interpretation of the facts, at the very least, it was a jury question. "Where a series of acts constitute either a single

point. What is significant is that despite the indisputable circumstance that the case was not tried on the basis of aggregating the value [12] of shipments made pursuant to an agreement and that the case was not submitted to the jury on that basis, the court below sustained the convictions on just that basis—and on that basis alone.

5. In *Grunewald*, this Court reversed because "under the judge's charge, the convictions * * * might have rested on an impermissible ground." 353 U. S. at 415. Here, however, the court below affirmed petitioners' convictions on a ground not only never submitted to the jury, but which petitioners unsuccessfully sought to have so submitted. In that respect, also, the present case is stronger for reversal than *Grunewald*. Indeed, the case at bar is probably unique in that it represents the only instance (or at least the only one of which we are aware) where a conviction has been affirmed pursuant to a theory on which the defendants themselves sought, but in vain, to have their guilt or innocence determined at the trial.

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larceny or a succession of larcenies depending on the existence or nonexistence of certain conditions, the question of whether such conditions existed is one of fact for the jury." 52 C. J. S. § 139, p. 987.

12. The trial judge here had earlier expressed grave doubts on the question of value (R. 12a), and finally ruled as he did essentially for reasons of convenience (R. 18a): "I think it is fairer to the Government to give the jury a chance to say yes or no, and if they say no, that is the end of it. If they say yes, you have the right of appeal, and everything else."

III. Since Section 2314 of the National Stolen Property Act Limits the Federal Offense Interstate Transportation of Stolen Goods to a Transportation Having a Value of $5,000 or More, It Was Manifest Error to Permit Convictions of Petitioners by Adding Together the Value of Separate and Distinct Shipments, No One of Which Involved the Statutory Amount.

Petitioners were found guilty of violating the National Stolen Property Act by a jury to whom the case was submitted on the premise that the statute permits aggregation of the value of separate and distinct transportations of goods each less than $5,000. The Government espoused this theory at the trial in the District Court, but in the Court of Appeals below, the Government completely abandoned its progeny. It appears that novelty is its only virtue.

Obviously the proper place to begin consideration of any proble of statutory construction is the language of the Act, although we must not stop there.[13] *Association v. Westinghouse Elec. Co.*, 348 U. S. 437.

The unambiguous language of Section 2314 of the National Stolen Property Act makes it a federal crime knowingly to transport in interstate commerce stolen "goods, wares, merchandise, securities or money of the value of $5,000 or more. . . ." Transportation of goods worth *less* than $5,000 is *not* a federal offense.

This plain meaning is fortified by an examination of the entire statute; the legislative purpose; contemporaneous decisions of several courts of appeals;[14] and by the accepted rules of statutory interpretation which teach that criminal statutes must not be extended beyond the scope which is clearly defined by the language.

13. Mr. Justice Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 529 (1947).

14. 2 Sutherland, Statutory Construction (3rd ed.) §§ 5108, 5109.

Congress acted with conscious deliberation in setting a $5,000 minimum on the federal crime. Other provisions within the same statute incorporate monetary limitations varying in amount according to explicit Congressional purpose. In the very same Section 2314 Congress made the transfer in interstate commerce of any tool used in counterfeiting—regardless of value—a federal crime. In Section 2315 it made certain acceptance, as security for a loan, of stolen goods of the value of $500 or more a federal offense. In Sections 2312, 2313, 2316, 2317, it made the transportation or receipt of any stolen motor vehicle or cattle a federal crime—regardless of value. Clearly, Congress made a knowing and meaningful choice as to what shall be a *minimum value* basis establishing the scope of federal penal laws.

The legislative history of the National Stolen Property Act of 1934 discloses that Congress refused to pass any bill which did not contain a $5,000 minimum value on the offense of transporting stolen goods in interstate commerce. Bills that had a $300 minimum, $1,000 minimum, and $2,500 minimum were not enacted.[15] It is obvious that a dominant purpose of Congress was that no shipment of goods valued at less than $5,000 should be a federal crime.

While raising the minimum value to $5,000, the House of Representatives incorporated a provision for aggregation of values which became Section 5 of the Act of May 22, 1934 and subsequently Section 417 of Title 18 of the U. S. Code (1940-1946 editions):

> "In the event that a defendant is charged in the same indictment with two or more violations

15. Hall, Federal Anti-Theft Legislation, 1 Law and Contemp. Prob. 424 (1934).

> of this Act, then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of Sections 3 and 4 hereof."

The language of this section is less than lucid, to say the least. As we have already shown, Congress had intentionally declined to make it an offense to transport stolen goods worth less than $5,000. Such a shipment would not be a violation of the Act. Yet the aggregation section clearly applies only when there are "two or more violations" of the Act, necessarily meaning two or more shipments each worth $5,000 or more. Section 5 on its face excluded the possibility of aggregating the value of shipments worth less than $5,000.[16]

The "two or more violations" language does not appear in the section of the present Criminal Code derived from Section 5 of the original Stolen Property Act. The language, since 1948, is as follows:

> ". . . the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof." (18 U. S. C. § 2311)

16. Indeed, the legislative history may not be so persuasive as to overcome the literal language—"two violations"—and therefore a theory of the statute that values of separate transportations may be aggregated where they are pursuant to a single plan and there is a "unity of purpose", to establish the minimum value of $5000, may not be permissible. *Commissioner of Internal Revenue v. Acker*, 361 U. S. 87. Especially, since Federal criminal law is wholly statutory in every respect, *United States v. Hudson*, 7 Cranch 32, and admittedly constructive offenses are not favored, if Congress desired to create one offense from multiple non-criminal acts, the meaning might have been more clearly expressed. *Ladner v. United States*, 358 U. S. 169. Since the question of the proper construction of the Act may be reached by the Court, we felt it incumbent upon us to suggest this possible interpretation here, although we did not urge this construction of the statute at the trial or in the court below.

As applied by the District Court in this case, this section was construed to permit the adding together of the values of several separate and distinct shipments, each worth less than $5,000, in order to reach the statutory amount. The trial judge specifically rejected the theory put forward by the petitioners that the several distinct transactions cannot be aggregated unless they were in fact made pursuant to a single plan or agreement giving them unity of purpose.

In its most narrow form, the only question of statutory construction is whether the District Judge committed error in not submitting this theory of the statute to the jury. If, as petitioners contend, the trial judge was wrong, the convictions must be reversed. It is not strictly necessary that some other construction of the statute now be approved. Nevertheless, consideration of the correctness of the theory on which the case was tried is facilitated by comparing it with more tenable possibilities. Moreover, the Court may wish to provide guidance on future application of this particular statute.

The present language of Section 2311 does not speak with clarity on the question of the proper circumstances for aggregation. The legislative history of the National Stolen Property Act strongly supports the view that aggregation is permissible only if the several transactions are the carrying out of a single plan or conspiracy.[17] This totally refutes the theory upon

17. Although the statute was reenacted as part of the general revision of the Criminal Code in 1948, we have the assurance of the Revisers that the change in language was not intended to effect any modification in the provision for aggregation. "In the paragraph defining 'value', which came from said section 417 of Title 18 (U. S. C. 1940 ed.), words 'in the event that a defendant is charged in the same indictment with two or more violations of Sections 413-419 of

which petitioners were actually tried in the District Court.

It is known with certainty that the clause permitting aggregation came into the Act as a part of the compromise between the House of Representatives and the Senate over the size of the monetary amount to be incorporated into the definition of the offense. The Senate adopted a bill with a $1,000 limit, but the House subsequently raised the figure to $5,000. It was at this stage that the provision for aggregation of amounts first appeared. A highly likely interpretation of this legislative bargaining is that the aggregation clause was inserted as a safeguard against simple attempts to evade the higher statutory amount by dividing a total scheme into separate shipments, each below $5,000 in value. Necessarily this strategy would arise out of an overall plan or agreement which would give the individual shipments unity for purpose of the statute.

This interpretation is reinforced by the repeated use of the phrases "series of transactions" and "series of violations" in the legislative materials connected with this Act.[18] The plain meaning of the word "series" denotes a succession of events having some connection or coordination, conforming to some overall arrangement or plan. A ready example is the World Series in baseball. The principle of a "series" is, of course, wholly inconsistent with the random concept inherent in the "separate and distinct" transactions theory under which petitioners were convicted.

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this title, then' were omitted and the same meaning was preserved by the substitution of the words 'a single' for the word 'such.'" H. R. Rep. No. 304, 80th Cong., 1st Sess., p. A145. The legislative history of the Act of May 22, 1934, retains its pertinence for guidance in interpreting the present version of the Stolen Property Act.

18. Appendix A2-A16.

A construction of the statute permitting aggregation only where there is unity of purpose or singleness of impulse comports with the common-law rule on the grading of larcenies. *E.g., People v. Cox,* 286 N. Y. 137, 36 N. E. 2d 84; *People v. Serna,* 43 Cal. App. 2d 106, 110 P. 2d 492; *Cartwright v. United States,* 146 F. 2d 133, 135 (C. A. 5); *United States v. Thomas,* 135 F. Supp. 662, 663 (E. D. Pa.). It is not to be assumed that Congress was unaware of this well-established rule of the common law in working out the statutory pattern of the new offense.

Furthermore, when Congress enacted the 1948 version of the Criminal Code, there is nothing in the history to reflect the slightest intention to reject the view of *Andrews v. United States,* 108 F. 2d 511 (C. A. 4), decided in 1939, where Judge Parker declared that: "While, of course, transactions which are entirely separate and distinct cannot be grouped for the purpose of establishing a value within the statute, they may be considered together where they are not separate and distinct but are the carrying out of a single plan or conspiracy." 108 F. 2d at 514.

It is virtually impossible to ascribe to Congress an intention to adopt the "separate and distinct" shipments theory applied by the District Court. The basic idea of joining together disconnected elements for the purpose of creating a crime is anathematic to the fundamental principles of our legal system. Under such a theory, conduct entirely innocent under the federal law when done would retroactively become criminal as a result of later independent actions. This result is inconsistent with the major premises of our Anglo-American system of criminal law.

Aggregation of "separate and distinct" transactions would lead to thorny problems of the statute of limitations. The Government's Brief in Opposition candidly admits that the charge against petitioners ". . . showed on its face that it covered shipments over a considerable period of time" (Brief in Opp. p. 8). It is conceivable, if not likely, that traditional statute of limitations doctrines would operate to permit unlimited relation back in time to reach transactions, not criminal when done, to be added to more recent conduct, similarly not criminal in itself.

It should be noted here that the argument against the "separate and distinct" theory is not an effort to insulate wrongful conduct from legal sanctions.[19] The crime here in question, interstate transportation of stolen goods, is a federally imposed superstructure over traditional state crimes. Extension of federal prosecution through unlimited aggregation of independent transactions would be an unnecessary intrusion into state affairs. See Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretions, 13 Law and Contemp. Prob. 64 (1948). If petitioners are guilty of complicity with dealers of stolen merchandise, their

19. It is therefore quite beside the point for the Court below to say (R. 111): "In the case before us there is no 'innocent act' being 'tainted' by subsequent occurrences; there is no legitimate interest of appellants worthy of protection; and the Congress has a very definite stake in curbing such socially undesirable conduct." With all deference, petitioners have and assert a thoroughly legitimate interest, that of not being deprived of their liberty in consequence of doing any act which Congress has, for any reason, not declared to be specifically criminal. The question is not whether petitioners' conduct was socially undesirable, but whether it was criminal; not whether they are good or bad men, but whether the prosecution has a good or bad case; and specifically, whether an act not criminal under federal law when done can thereafter be rendered criminal by reason of another act done much later, in the absence of either allegation or proof or jury finding that the two acts were linked by an agreement.

conduct on each one of the separate and distinct transactions would be a violation of state criminal law.

The most compelling witness to the error in the "separate and distinct" theory is the unwillingness of the Government to stand on the position taken at its behest by the District Court. In the Court of Appeals, the Government made no attempt to sustain the conviction on the theory applied in the trial court. The Government's argument on this point was that "the shipments of stolen goods that were aggregated in this case were related in such a way that they had, in the words of Judge Parker in *Andrews v. United States, supra,* 'unity for the purpose of the statute' " (Gov't Brief, p. 37, Appendix A17). It is not entirely surprising, therefore, that the Court of Appeals affirmed the conviction on the exact theory which the District Court had refused to apply.

The Government moved even farther from the position of the case, as actually tried, in the Brief in Opposition to the Petition for Certiorari. Whereas in the Court of Appeals the Government simply made no effort to argue on the theory applied by the trial court, the Brief in Opposition virtually admits that the theory underlying the convictions is invalid. It was stated that "Of course, if several shipments relate to wholly unconnected schemes, an indictment combining such unrelated charges might be open to attack on a charge of duplicity or misjoinder" (Br. in Op., p. 8).[20] To say that "wholly unconnected schemes" cannot be joined

20. The Government went on to say, however, that no attack had been made on the indictment here. When it is recalled that the indictment in this case bracketed the charges of separate shipments with a frivolous allegation of conspiracy (See Point I of Argument), thereby precluding any attack on the ground of misjoinder, the Government's position is, to say the least, untenable.

together in a single indictment is to say that they cannot be aggregated under Section 2311, for the one standard clearly in that section is whether the several transactions are in a single indictment.

Finally, if a penal Act of Congress is so drawn as to make it really difficult to say what was intended and what facts come within it, the statute should not be extended by legal alchemy to supply what is omitted. *McBoyle v. United States*, 283 U. S. 25; *United States v. Resnick*, 299 U. S. 207; *United States v. Cardiff*, 344 U. S. 174; *Bell v. United States*, 349 U. S. 81.

We submit that an interpretation of this statute permitting aggregation of the values of goods in separate and distinct transportations to establish the $5,000 value is unwarranted, unprecedented and unnecessary. Federal jurisdiction should not be stretched in penal statutes to cover doubtful cases and thereby invite problems of constitutionality. The District Court, in refusing to charge the jury that a finding of guilty must rest on a determination that the several shipments were related to a general plan or agreement giving them unity of purpose, committed error, and the convictions must be reversed.

CONCLUSION.

It is respectfully submitted that the judgment below should be reversed.

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January 1960

APPENDIX

73D CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
No. 1462

TRANSPORTATION OF STOLEN PROPERTY IN INTERSTATE COMMERCE

MAY 3, 1934.—Referred to the House Calendar and ordered to be printed

MR. SUMNERS of Texas, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2845]

The Committee on the Judiciary, to whom was referred the bill (S. 2845) to extend the provisions of the National Motor Vehicle Theft Act to other stolen property, after consideration, report the same favorably to the House with amendments with the recommendation that the bill as amended do pass.

The committee amendments are as follows:

Page 2, line 1, strike out the words "'security' shall mean" and insert in lieu thereof the words "'securities' shall include";

Pages 2 and 3, strike out sections 3 and 4 and insert in lieu thereof the following:

SEC. 3. Whoever shall transport or cause to be transported in interstate or foreign commerce, any goods, wares or merchandise, securities, or money, of

the value of $5,000 or more, theretofore stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment of not more than 10 years, or both.

SEC. 4. Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares or merchandise, securities, or money, of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving in, or which are a part of interstate or foreign commerce, and which, while so moving or constituting such part, had been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen or taken, shall be punished by a fine of not more than $10,000, or by imprisonment of not more than 10 years, or both.

SEC. 5. In the event that a defendant is charged in the same indictment with two or more violations of this act, then the aggregate value of all goods, wares, and merchandise, securities, and money, referred to in such indictment, shall constitute the value thereof for the purposes of sections 3 and 4 hereof.

Page 3, line 8, strike out "5" and insert "6".

Page 3, line 10, strike out the word "Security" and insert in lieu thereof the word "securities".

Page 3, line 10, strike out the word "has" and insert in lieu thereof the word "have".

Page 3, line 12, strike out "6" and insert in lieu thereof "7".

This bill is designed to punish interstate transportation of stolen property, securities, or money. Receiving, concealing, pledging, or disposing of such property, with knowledge that the same was stolen, is also made an offense.

As reported by your committee, the jurisdiction of the Federal Government is limited to cases in which the value of the stolen property is $5,000 or more, except in cases of pledging or accepting in pledge such property for a loan in which case the minimum is set at $500. There is added a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more.

It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General.

The bill is drafted to follow the language of the Dyer Act, the constitutionality of which has frequently been upheld in the Federal courts. It is not intended to limit the scope of that act, however. There is a precautionary provision to the following effect:

Nothing herein shall be construed to repeal, modify or amend any part of the act of October 29, 1919 chapter 89, cited as the National Motor Vehicle Theft Act.

Previous Congresses have considered bills providing punishment for interstate shipment of stolen property. In 1930 a national stolen property bill, H. R. 119 (71st Cong. 2d sess.), limited to property having a value

in excess of $300, was passed on February 5, but a similar bill in the Senate failed of passage. In the Seventieth Congress a national stolen property bill, without any limitation as to the value of the property involved, was favorably reported by the House Judicial Committee. A much narrower bill was favorably reported by Senate and House Committees in the first session of the Sixty-ninth Congress (S. 1871, S. Rept. 923; H. R. 7472, H. Rept. 1581). In the second session of this Congress the bill passed the Senate on December 10, 1936, but did not come to a vote in the House.

73D CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT No. 1599

EXTEND PROVISIONS OF NATIONAL MOTOR VEHICLE THEFT ACT TO OTHER STOLEN PROPERTY

MAY 11, 1934.—Ordered to be printed

MR. SUMNERS of Texas, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 2845]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 2845) to extend the provisions of the National Motor Vehicle Theft Act to other stolen property, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendments of the House numbered 1, 3, 4, 5, and 6; and agreed to the same.

Amendment numbered 2:

That the Senate recede from its disagreement to the amendment of the House numbered 2, and agree to the same with an amendment as follows:

In the matter proposed to be inserted by the House amendment, strike out beginning in line 13 on page 1 down through line 9 page 2 of the House engrossed amendments and insert in lieu thereof the following:

Sec. 4. Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more which, while moving in or constituting a part of interstate or foreign commerce, has been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen or taken, shall be punished by a fine of not more than $10,000 or by imprisonment of not more than 10 years, or both.

On page 1, line 7, of the House engrossed amendments insert a comma after "money"; and the House agree to the same.

HATTON W. SUMNERS,
A. J. MONTAGUE,
TOM D. MCKEOWN,
RANDOLPH PERKINS,
Managers on the part of the House.

HENRY F. ASHURST,
WILLIAM H. KING,
WM. E. BORAH,
Managers on the part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the bill (S. 2845) to extend the provisions of the National Motor Vehicle Theft Act to other stolen property, submit the following statement in explanation of the effect of the action agreed upon by the conference and recommended in the accompanying conference report.

The first amendment of the House, page 2, line 1, to strike out "'security' shall mean" and insert "'securities' shall include", was agreed to.

The second amendment of the House was to strike out sections 3 and 4 of the original bill and insert in lieu thereof two new sections. The principal difference in section 3 as thus amended is the limitation of jurisdiction of the proposed act to the transportation of stolen goods, wares or merchandise, securities, or money, of the value of $5,000 or more. This section, as amended by the House, remains unchanged, except for the insertion of a comma after the word "money" on page 1, line 7, of the House engrossed amendments.

Section 4 makes it unlawful to receive, conceal, store, barter, sell, or dispose of certain goods, wares, or merchandise, securities or money, of a value of $5,000, or more. As passed by the Senate, this section provides a penalty for the receipt or disposition of such stolen property while moving in interstate commerce, knowing such property to have been stolen. As passed in the House, this section provides a penalty for the receipt or disposition of such property while moving in inter-

state commerce if such property was stolen while moving in interstate commerce, with knowledge that it was stolen while moving in such commerce. Section 4, as agreed upon in conference, provides a penalty for the receipt or disposition of such property stolen while moving in interstate commerce, knowing the property to have been stolen. The obvious purpose of section 4 was to protect interstate commerce by going after the "fence"—the guilty receivers or disposers of property, stolen while being transported in such commerce. The original Senate bill does not fully accomplish this, for it includes any stolen property, so long as it is received or disposed of while moving in interstate commerce. The conference amendment is limited to the receipt or disposition of property stolen while in interstate commerce, but such property need not be received or disposed of while moving in interstate commerce.

The second amendment of the House added, also, a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more. The Senate agreed to the amendment.

The third, fourth, and fifth amendments of the House are merely formal changes in the proposed act. They have been agreed to by the Committee of Conference.

HATTON W. SUMNERS,
A. J. MONTAGUE,
TOM D. MCKEOWN,
RANDOLPH PERKINS,
Managers on the part of the House.

76TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
No. 422

AMENDING THE NATIONAL STOLEN PROPERTY ACT

APRIL 18, 1939.—Referred to the House Calendar and ordered to be printed

MR. HEALEY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 1996]

The Committee on the Judiciary, to whom was referred the bill (H. R. 1996), to amend the National Stolen Property Act, after consideration, report the same favorably to the House with the recommendation that it do pass. The proposed legislation in the form in which it is here reported passed the House during the first session of the Seventy-fifth Congress (May 17, 1937). It failed to secure consideration in the Senate, however, and died with the adjournment of the Congress.

The bill widens the scope of the National Stolen Property Act of 1934 (48 Stat. 794; U. S. C., title 18, sec. 415) by making its provisions applicable to em-

bezzled property, securities and money, and counterfeited securities, in the particulars below noted. The bill has been recommended by the Attorney General.

SECTION 1

Section 3 of the Stolen Property Act makes it a Federal criminal offense knowingly to transport in interstate or foreign commerce stolen property, securities, or money of the value of $5,000 or more. This section of the law is amended by section 1 of the reported bill to include such transportation of property, securities, or money of the same minimum value which have been feloniously converted, and also to include transportation of falsely made, forged, altered, or counterfeited securities of the apparent or purported value of $5,000 or more. Counterfeited securities of the United States and foreign governments are exempted by a proviso because they are dealt with adequately by other provisions of existing law.

The limitation requiring the property involved to be of a value of $5,000 or more before the bill becomes operative is left unchanged. This limitation was put into the law for the reason, as stated in the House Judiciary Committee report (H. Rept. 1462, 73d Cong., 2d sess.) at the time the original bill was reported:

It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General.

It is to be noted, in this connection, that under the terms of section 5 of the act in the event the defendant is charged with a series of violations. the aggregate value of the property referred to in the indictment may be taken to make up the minimum valuation.

SECTION 2

Section 4 of the Stolen Property Act penalizes the act of knowingly receiving, concealing, or disposing of stolen property, securities, or money of the value of $5,000 or more in interstate commerce. It also makes the penalties of the act applicable to one who in interstate commerce pledges or accepts as security for a loan any property or securities of the value of $500 or more, knowing the same to have been stolen.

Section 2 of the reported bill amends this section of the law by extending its provisions, as in the preceeding amendment, to the case of embezzled property, money, and securities, and to forged or counterfeited securities, with the same limitations as to minimum real or apparent or purported value. The same exemption with regard to obligations of the United States or foreign governments as contained in the preceding section is contained in this amendment, and for the same reason.

The language with reference to the interstate-commerce element of the transactions denounced is clarified.

SECTION 3

Section 5 of the present act provides that in the event a defendant is charged with two or more violations of the act the aggregate value of the property, securities, and money involved shall constitute the value thereof for the purpose of meeting the minimum valuation requirements of the act.

Section 3 of the reported bill amends section 5 of the act by adding a clause defining the value of securities as the face, par, or market value, whichever is greatest. It also defines the value of forged or counterfeited securities as the apparent or purported face, par, or market value, whichever is greatest.

SECTION 4

Section 4 of the reported bill amends section 6 of the present act, by providing that persons violating the act may be tried in any district from which the transportation in interstate commerce takes place as well as into or through which such transportation occurs.

SECTION 5

This section adds a new conspiracy section to the act, to be known as section 7. It provides that when two or more persons enter into conspiracy to violate any provision of the act and commit any overt act toward effectuating the same, they shall be punished in like manner as provided in other sections of the act, that is, by a fine of not more than $10,000 or imprisonment for not more than 10 years, or both.

SECTION 6

This is merely a clerical change redesignating section 7 of the present act as "section 8." This is made necessary by the insertion of the new section 7 referred to in the preceding paragraph.

The following communication from the Attorney General addressed to the Speaker of the House recommends enactment of this legislation:

DECEMBER 29, 1938.

HON. WILLIAM B. BANKHEAD,

The Speaker, House of Representatives,

Washington, D. C.

MY DEAR MR. SPEAKER: The National Stolen Property Act, approved May 22, 1934 (48 Stat. 794; U. S. C., title 18, sec. 415), in effect makes it a criminal offense to transport in interstate or foreign commerce any stolen goods, securities, or money of a value of at least $5,000.

Experience in the administration of the act has indicated that it is desirable to include within its provisions property, money, or securities, that have been embezzled as well as those that have been stolen.

It is also desirable to include the transportation of counterfeit securities within the prohibitions of the statute. It need not, however, embrace counterfeit Government obligations or counterfeit foreign obligations, as the statutes relating to counterfeiting penalize their possession.

Section 1 of the enclosed bill, drafted in this Department, proposes to amend section 3 of the act in order to accomplish the foregoing results.

Section 4 of the present act relates to receiving stolen goods after their transportation in interstate or foreign commerce. The language of the act requires clarification on this point. Section 2 of the enclosed bill proposes to attain this objective, as well as to make it sufficiently broad to cover the receiving of embezzled property and of counterfeit securities.

Section 3 seeks to clarify the definition of "value" for the purposes of the act, while section 4 amends the

jurisdictional provisions of the statute to correspond with the other amendments. Section 5 would add a conspiracy provision to the statute.

I recommend the enactment of the bill.

A similar bill was passed by the House in the last Congress.

Sincerely yours, ——— ———, *Attorney General.*

In compliance with clause 2a of rule XIII, existing law is printed below in roman, with matter proposed to be stricken out enclosed in black brackets and new matter proposed to be inserted printed in italics:

SEC. 3. Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, *feloniously converted,* or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, *feloniously converted,* or taken, *or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities of the value of $5,000 or more, knowing the same to have been falsely made, forged, altered, or counterfeited,* shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: *Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in section 147 of the Criminal Code (U. S. C., title 18, sec. 261) or (2) an obligation, bond, certificate, security, treasury note, bill, promise to pay,*

or bank note, issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288), or by a bank or corporation of any foreign country.

SEC. 4. Whoever shall receive, conceal, store, barter, sell, or dispose of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, [which, while moving in or constituting a part of interstate or foreign commerce, has been stolen or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen or taken,] *moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted or taken, or whoever shall receive, conceal, store, barter, sell, or dispose of any falsely made, forged, altered, or counterfeited securities, of the value of $5,000 or more, or whoever shall pledge or accept as security for a loan any falsely made, forged, altered, or counterfeited securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited* shall be punished by a fine of not more than $10,000 or by imprisonment [of] *for* not more than ten years, or both: *Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an "obligation or other security of the United States" as defined in section 147 of the Criminal Code (U. S. C., title 18, sec. 261), or (2) an obligation, bond, certificate, security, treasury note, bill, promise to pay,*

or bank note, issued by any "foreign government" as defined in the Act of June 15, 1917, title VIII, section 4 (U. S. C., title 18, sec. 288), or by a bank or corporation of any foreign country.

SEC. 5. In the event that a defendant is charged in the same indictment with two or more violations of this Act, then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 thereof, *and the value of any securities referred to shall be considered to be the face, par, or market value, whichever is the greatest. For the purposes of this Act, the value of any falsely made, forged, altered, or counterfeited securities shall be considered to be the apparent or purported face, par, or market value, whichever is the greatest, of the securities so falsely made, forged, altered, or counterfeited."*

SEC. 6. Any person violating this Act may be [punished] *tried* in any district *from*, into or through which such goods, wares, or merchandise, or such securities, or money *or such falsely made, forged, altered, or counterfeited securities* have been transported or removed.

SEC. 7. *If two or more persons enter into an agreement, confederation, or conspiracy to violate any provision of this Act, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as hereinbefore provided by this Act.*

EXTRACT FROM GOVERNMENT'S BRIEF.

Despite the Court's dismissal of the conspiracy count under Indictment C 145-232, the evidence nevertheless established that each of the appellants in their original negotiations with Tony Stracuzza contemplated, not merely one purchase, but a series of purchases. The discussion of the discount to be given and the arrangement for the sending of the copies of the original manufacturers' invoices with the cartons of merchandise would be meaningless unless the parties contemplated a number of transactions. That the evidence sufficiently indicated a related series of shipments is in no way inconsistent with the failure to prove the conspiracy.

The shipments of stolen goods that were aggregated in this case were related in such a way that they had, in the words of Judge Parker in Andrews v. United States, supra, "unity for the purpose of the statute." (Gov't Brief, p. 33 in Court below.)

FILE COPY

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IN THE

Supreme Court of the United States

October Term, 1959

No. 122

HYMAN KARP and BENJAMIN T. MARCO,

Petitioners,

—against—

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS.

HARRIS B. STEINBERG,
25 Broad Street
New York 4, New York

(HARRIS B. STEINBERG,
BARBARA A. LINDEMANN,
Of Counsel)

February, 1960

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IN THE

Supreme Court of the United States

October Term, 1959

No. 122

HYMAN KARP and BENJAMIN T. MARCO,

Petitioners,

—against—

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (R. 104-118)* is reported at 266 F. 2d 435 (2d Cir., 1959). The opinion of the District Court, Southern District of New York, denying the pre-trial motion for a severance is reported at 158 F. Supp. 522 (S. D. N. Y., 1948).

Jurisdiction

The judgment of the Court of Appeals was entered on April 21, 1959 (R. 119). Petition for rehearing was denied

* References in parenthesis preceded by "R" are to pages of the printed record. References preceded by "Tr." are to pages of the typewritten minutes of the trial.

on May 14, 1959 (R. 119-120). The petition for a writ of certiorari was filed on June 11, 1959, and was granted on October 12, 1959 (R. 121), 361 U. S. 809 (1959). The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

Questions Presented

The questions presented are identical with those set forth in the Petitioners' Brief, in No. 111 (*Schaffer* v. *United States*) at page 2 thereof. That case will be argued together with the present case.

In addition, there is presented the following question:

> Whether the conduct of the prosecutor, during his closing argument to the jury, wherein he made representations of fact, and as of personal knowledge, not supported by the record, and wherein he tendered a false issue as to his own veracity and position, and made himself an unsworn witness for the prosecution, prevented a fair trial.

Statutes and Rules Involved

Reference is made to pages 2 to 5, inclusive, of the Petitioners' Brief in No. 111. The statutes and rules there listed are applicable to this case.

Statement

These petitioners adopt the Statement contained in the Schaffer brief, No. 111 (pp. 5-16, inclusive).

In addition, the following is added, in behalf of the petitioners Karp and Marco:

Petitioners Karp and Marco, while joining in all the points and contentions made by the Schaffers, urge one additional ground for the granting of the writ herein, to wit, deprivation of fair trial by reason of the prosecutor's arguments in summation. Accordingly, in addition to the facts set forth by the Schaffers, the following facts require mention here.

There was never any question but that all of the petitioners had openly purchased stolen goods from Anthony Stracuzza. They had paid for the goods by check, and received shipments via recognized agencies. The petitioners had maintained complete written records of the transactions, and these books were voluntarily turned over to the F.B.I. when they commenced their inquiry. The sole issue before the court was whether the petitioners had acted with knowledge of the stolen nature of the goods. The cornerstone of the prosecution was therefore the testimony of Anthony Stracuzza, a confessed thief, admitted loan shark, gambler and tax dodger; brother of Mario Stracuzza, another confessed and several-times-convicted thief; and husband of Dorothy Stracuzza, arrested and indicted in several cases, including the one at bar. It was Anthony Stracuzza who gave the important testimony bearing on this single, principal and crucial issue of the alleged guilty knowledge of the petitioners that the goods they were buying from Stracuzza were stolen.

The credibility of Anthony Stracuzza was accordingly subjected to heavy attack on cross-examination. Basic in this attack was the consistent contention of the defense, throughout the trial, that he was tailoring his testimony to favor the Government, in the expectation of a "reward"—lenient treatment not only for himself, but for his brother and his wife, as well.

Thus, Anthony had been charged not only in the two indictments tried in the instant case, but he had also been indicted jointly with a number of truck-drivers who were package thieves. In all of these cases he had pleaded guilty. In one additional case, resulting from a theft committed *after* he began to "cooperate" with the F. B. I., he had received a suspended sentence, with the help of the prosecutor. In the other case sentence had been repeatedly postponed, until after his testimony should have been given in the instant case. Mario, his brother, was in like state; he too had pleaded guilty to three indictments, and his sentence was repeatedly adjourned until after the present trial. Moreover, Mario had been caught by State authorities in a theft committed *after* he began his "cooperation", and, on his plea of guilty in the State Court, sentence had been repeatedly postponed, on representations by the Federal prosecutor that Mario was "cooperating" in the instant case, *and that his testimony was necessary in this case.* Finally, Anthony's wife, Dorothy, similarly indicted in the Federal Court in three cases, had been accorded a severance of trial, had never been placed on trial, had never pleaded guilty, and indeed, had never even been called as a witness in any trial.

Anthony and Mario had both testified at length for the Government in the prior trial of the thieves. Anthony, in the present trial, maintained that his wife had no guilty knowledge of his illegal activities (Tr. pp. 594, 599, 600-601), although he admitted testifying to precisely the opposite effect at the previous trial (Tr. pp. 594-595). In this connection he admitted that his wife maintained several bank accounts under different names, one of which was not her true one, into which accounts the proceeds of his sales to these defendants were deposited (Tr. pp. 491, 519, 649-

651); that some of the checks were cashed in supermarkets (Tr. p. 523); and that she had worked for several weeks in Stracuzza's office, up to the time of his arrest, making out bills, changing tickets on merchandise, and keeping records of the transactions (Tr. pp. 600-691). Indeed, the fictitious name of Stracuzza's business, "A. Schafler", was very much like her own maiden name which was "Schaefler" (Tr. pp. 595-598). In sum, she did everything, and knew everything which it was charged the defendants did and knew, to fasten guilty knowledge on them, and yet she was claimed by Stracuzza to be innocent of wrongdoing or wrongful knowledge or intent herself.

The defense stated in its opening that it would prove its contention that the Stracuzzas were testifying for an anticipated reward in the shape of hoped-for lenient treatment (Tr. p. 299): it made known its contention that the government was under a duty to call Mario and Dorothy as prosecution witnesses, so that they could be subjected to cross-examination by the defense, to which they were obviously hostile. Defense counsel vigorously protested the prosecutor's refusal to do so (Tr. pp. 1157-1160); it tried unsuccessfully to introduce in evidence the complete statements which were made by the Government to the sentencing judge at the time Stracuzza was given a suspended sentence on a previous case* (Tr. pp. 670-678); and at-

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*The sentencing court asked the prosecutor whether this was an isolated offense, and the prosecutor replied in the affirmative. (Minutes of sentence, case C. 150-325, Sept. 19, 1956, before RYAN, J.):

"The Court: Are there any other larcenies that these men are connected with?

Mr. Kantor: No, your Honor.

The Court: This is an isolated larceny?

Mr. Kantor: As far as the Government knows."

The minutes of the present trial, as well as the minutes of the previous package thieves' trial, would furnish an interesting commentary on this appraisal of Stracuzza's activities.

tempted unsuccessfully—because the court kept it out—to show, by available court record evidence, that the large sums of cash seized from the possession of Mario and Dorothy Stracuzza, when they were arrested, were later returned to them with the consent of the United States Attorney after they had "cooperated" (Tr. pp. 874-875).

Finally, in summation, the defense argued that the Government's failure to call Mario and Dorothy to the stand, thus preventing their cross-examination, was relevant in considering whether or not Anthony Stracuzza was testifying in hopes of a reward for himself and the members of his family (Tr. pp. 1471-1477, 1484).

The relevant excerpts from the defense summation are set forth at pages 1 to 8, inclusive, of the Record.

In answer, the prosecutor made certain statements, to which objection was noted, a motion for mistrial made and denied, and exception taken (R. 8-10, 11a). The tenor of these remarks was a disingenuous and misleading statement to the jury that Dorothy Stracuzza was "still a defendant in this court. The charges are still open against her. They have not been dismissed in any way" (R. 9). Actually on July 31, 1958, shortly after the present trial was completed, the Government entered *nolle prosequis* in all the cases against Dorothy Stracuzza (R. 10-12).

The prosecutor went on to tell the jury that it was "the Government's representation to you that he (Mario Stracuzza, the brother, not called to the witness stand) could have offered nothing in the way of additional evidence that was not presented to you through his brother. . . . Furthermore, the Government is not required to call any wit-

ness if we believe that there is nothing further that that witness can contribute in the search for the truth." (R. 9).

The prosecutor concluded by telling the jury that "if you believe that the Government has in some way or other prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march into that jury room and acquit everyone of these defendants" (R. 10).

Summary of Argument

These petitioners respectfully refer to, and adopt, the Summary of Argument of the Schaffers, as set forth in their brief, at pages 16 to 22, inclusive.

In addition, the following is offered:

IV. Petitioners Karp and Marco submit that the manifest impropriety of the prosecutor's summation, which was promptly objected to, and made the subject of a motion for mistrial, deprived them of a fair trial.

The court gave no indication that the prosecutor's closing arguments were improper, and administered no rebuke, nor did it give ameliorating or corrective instructions. The affirmance in the court below of this ruling was in conflict with the rules laid down in this Court, the Circuit Courts and the State Courts. *Berger* v. *United States*, 295 U. S. 78, 88 (1935); *United States* v. *Spangelet*, 258 F. 2d 338 (2d Cir., 1958); *United States* v. *Tucker*, 267 F. 2d 212 (3d Cir., 1959); *Nalls* v. *United States*, 240 F. 2d 707 (5th Cir., 1957); *Snipes* v. *United States*, 230 F. 2d 165 (6th Cir., 1956);

Pierce v. *United States*, 86 F. 2d 949, 953 (6th Cir., 1936); *People* v. *Lovello*, 1 N. Y. 2d 436 (1956); *People* v. *Tassiello*, 300 N. Y. 425, 428-431 (1950); *People* v. *Black*, 317 Ill. 603, 148 N. E. 281 (1925); *People* v. *Hoffman*, 339 Ill. 57, 170 N. E. 680 (1948); *Balis* v. *State*, 137 Neb. 835, 291 N. W. 477 (1940); and see cases collected in 75 A. L. R. 48-59, 50 A. L. R. 2d 754-868.

To allow the opinion of the court below to stand, with its acceptance of the prosecutor's summation as a proper answer to the defense summation, would be to open the door to a new type of advocacy on the part of the Government, destructive of basic concepts of fairness.

Argument

We adopt, and make reference to, the Argument contained in the Schaffer brief, at pages 23 to 48, inclusive. We add the following point:

IV. The prosecutor's improper comments in summation deprived the petitioners of a fair trial.

A. Background of the questions presented.

The lengthy cross-examination of Anthony Stracuzza, bearing on his general untrustworthiness and criminal antecedents, designed to impair his credibility, was not undertaken captiously. On the contrary, it was clearly the duty of defense counsel to explore fully this aspect of the case. Stracuzza was the key witness who testified for the prosecution. It was Anthony Stracuzza who gave testimony that the defendant Karp called him from Fall River, and asked whether he had corrupt "police protection", when

Karp was supposedly fearful of exposure (Tr. pp. 430-432). Stracuzza also stated that he enclosed incriminating manufacturers' invoices in every shipment to Karp and Marco (Tr. pp. 403-406), as well as to the Schaffers (Tr. pp. 402-403); that the Schaffers repeatedly saw these incriminating invoices when they visited his premises (Tr. pp. 397-399); and he recounted alleged highly incriminating conversations with Marco (Tr. pp. 460-462). All of these matters bore on the single principal and crucial question of the alleged guilty knowledge with which the defendants acted; there was never any question but that they had purchased the goods, and the details of payment by check, and shipment by recognized agencies were openly carried out and reflected in complete records, which were voluntarily turned over to the F.B.I. when they disclosed to the defendants their interest in these matters.

Stracuzza's motives for lying, to favor the prosecution at the expense of the defendants, were real and compelling. He was obviously seeking favored treatment from the Government for himself, his wife and his brother. The glimpses of the pending "deal" which came through, despite restrictive rulings by the court, were disturbing: the return of money seized as evidence and the intercession of the Federal prosecutor in State prosecutions, for crimes committed by the Stracuzzas *after* they had been arrested in this case, were all of a piece. The sheltering of Mario—who had previously been described by the prosecutor as a necessary witness in this case—from being called and cross-examined, as well as the sheltering of the wife, seem clearly to have been the result of a policy decision to avoid further disclosures of the Government's plans to let the Stracuzzas all go free, if these defendants could be convicted with their

aid. The jury might well have been disturbed had they known what was even then quite evidently in contemplation, so far as the disposition of the cases aginst the Stracuzzas was concerned.

Accordingly, we submit, the line taken in the defense summation was a proper one, based on real considerations of evidence and lack of evidence in the case. It cannot be deemed, in any sense, improper advocacy setting up an unworthy standard, and justifying a low standard of advocacy on the part of the Government.

B. The prejudicial summation by the prosecutor.

1. The Assistant United States Attorney, toward the beginning of his closing statement, spoke as follows (R. 8-9):

> "Before I begin my summary, however, I wish to address myself, in the way of making a few comments as to some of the remarks that were made in the course of the summations by the defense counsel this morning.
>
> There were allusions from time to time, or suggestions, if you will, as to why the Government had not called certain persons as witnesses, so that they could be subjected to cross-examination by the defense counsel. Two of the names that were prominently mentioned were Mario Stracuzza and Dorothy Stracuzza.
>
> As you recall, during the course of the trial Dorothy Stracuzza, as was indicated, the Government's case aginst her pertaining to the two indictments that these defendants were brought to trial on, *she was severed; she is still a defendant in this court. The charges are still open against her. They have not been dismissed in any way.*" (Emphasis added).

We submit, parenthetically, that the foregoing is, at the very least, a holding out to the jury that Dorothy's case was still being held open with the expectation, in good faith, that she would be tried, or required to plead. In the context of answering the defense contention that Dorothy was being shielded by the Government, as a reward for her husband's testimony against the defendants on trial, no other meaning can reasonably be attributed to that statement. The good faith of that holding out can best be assessed in light of the fact that on July 31, 1958, shortly after the present trial and sentencing was completed, the Government entered *nolle prosequis* in all the cases against Dorothy Stracuzza (R. 10-12).

The stated grounds of the *nolle prosequi* were two in number:

(1) Dorothy had "denied that she had knowledge of the fact that the merchandise handled by her husband was stolen"; and

(2) Anthony had "stated that his wife Dorothy Stracuzza never knew the extent of his operations and that he never told her that he was dealing in stolen merchandise" (R. 12).

Yet the "denial" of Dorothy was never subjected to the proving or scrutiny of cross-examination because the Government never called her, and Anthony's statement that his wife knew nothing of his illegal operations was belied by his testimony at the trial, wherein he admitted on cross-examination that at a previous trial he had sworn that she had guilty knowledge (Tr. pp. 594-595).

2. The prosecutor continued his summing-up as follows:

> "As to the other defendant, Mario Stracuzza, *it is the Government's representation to you that he could have offered nothing in the way of additional evidence that was not presented to you through his brother.* Because if you will recall from the testimony of Agent Miller, both Stracuzzas were interviewed on each and every occasion by him, their story, their testimony, if you will, given to the FBI, was a joint story, and therefore, *the testimony of Mario Stracuzza, if he were called to testify, would be in a sense a repetition of all the details that you heard through the witness Anthony Stracuzza.*
>
> Furthermore, the Government is not required to call any witness *if we believe that there is nothing further that that witness can contribute in the search for the truth*" (R. 9; emphasis added).

Here the prosecutor was making a "representation" of fact, as of his own knowledge of the case, that Mario had nothing to contribute to the search for the truth, which would not be cumulative of Anthony's testimony. This was bolstered by the further statement that his "belief", based on his personal knowledge of what Mario could say, was that it would not "contribute" to the search for "the truth".

The record reveals, however, that when Mario's brother Anthony had been cross-examined, he had been constrained to admit theretofore undisclosed activities as a loan shark (Tr. pp. 493-496), had been forced to acknowledge that he was the possessor of two automobiles, and a cash-paid $13,000 house (Tr. pp. 483-485), that he was heavy and remarkably successful gambler (Tr. p. 497), that he was an admitted tax-dodger (Tr. pp. 497-499, 501)—and that

he had accumulated all his considerable possessions while working for a very small salary (Tr. p. 483). In addition, although Anthony claimed that everything he sold to the defendants was stolen, he admitted on cross-examination that he had very little personal knowledge of the details of this crucial element in the case, since it was his brother Mario, and not he, who had carried on the actual negotiations with the thieves, and it was Mario who had bought and paid for the stolen goods (Tr. pp. 388, 584-585, 586-587, 589). On the important issue of the defense claim of "reward" for Stracuzza's testimony, the defense was effectively blocked, by the Government's failure to call Mario, from showing (a) that Mario, when arrested, had had $900 in cash on his person, presumably for the purchase of stolen goods; that Dorothy, at the same time, had $1,900 in cash on her person; that all of this money had been seized by the F.B.I. as evidence; and that these sums were released to Mario and Dorothy, with the prosecutor's consent, shortly *after* they began to "cooperate" (Tr. pp. 874-875); (b) from showing that Mario had again been caught stealing *after* he began to "cooperate", and although indicted in the State Court, his sentence there was repeatedly adjourned, on the representation that he was "cooperating" with the Federal authorities, *and that he would testify in this case*, which of course, he never did because the Government did not call him (Tr. p. 1158). There can be little doubt that considerations of strategy to accomplish this blocking of cross-examination, rather than any reluctance to clutter the record with cumulative testimony, was the real reason for the failure to call Mario. Mario, we note, did testify at length in the previous trial, and was there subjected to searching and embarrassing cross-

examination (Tr. p. 1158). Apparently, neither he nor the Government was anxious that he be subjected to further cross-examination.

3. The prosecutor continued his summation as follows:

> "As Mr. Steinberg told you, and as I will say to you now, he had an opportunity to bring Mario Stracuzza to the witness stand. He also had an opportunity to bring Dorothy Stracuzza to the witness stand. He did not do so for reasons best known to himself.
>
> Now, in making these comments as to the conduct of the prosecution, there were [sic] some criticism as to the extent that the Government failed in its obligations to its citizens to bring out all the facts. I say to you as an assistant United States attorney, my job is not to convict people, but is to bring them here in court, give them a fair chance to meet the charges that the Government has presented against them.
>
> The motto on the building of the Department of Justice in Washington I think fairly indicates the attitude of the Government, as far as its citizens are concerned. It reads:
>
> 'The Government wins when justice is done its citizens in the court.'
>
> *Now, of course, if you believe that the Government has in some way or other prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march into that jury room and acquit everyone of these defendants*" (R. 10-11; emphasis added).

Motion was promptly made for the withdrawal of a juror, because of the impropriety of all of the foregoing remarks. The motion was denied, and an exception was taken (R. 10). The court administered no rebuke to the prosecutor, and gave no ameliorating instruction to the jury. It did not even indicate that there was any impropriety in any of the remarks to which objection was noted.

Here, we submit, the prosecutor was tendering to the jury the false issue of his own integrity, as a substitute for the real issue of the defendants' guilt. He was representing himself, not as a partisan advocate, but as a sort of objective judge, who would be only too happy to lose the case, if he had in any way erred. He was giving the jury the ineluctable choice of convicting the defendants, or in effect, convicting him of impropriety.

C. Consideration of the relevant cases.

The cases are unanimous in holding that where the prosecutor, in his summation, purports to tell the jury facts of his own knowledge, or his beliefs, or where he puts the propriety of his conduct in issue, he is committing reversible error, and a mistrial should be granted.

Berger v. *United States*, 295 U. S. 78, 84-89 (1935);

United States v. *Spangelet*, 258 F. 2d 338 (2d Cir., 1958);

United States v. *Tucker*, 267 F. 2d 212 (3d Cir., 1959);

Nalls v. *United States*, 240 F. 2d 707 (5th Cir., 1957);

Snipes v. *United States*, 230 F. 2d 165 (6th Cir., 1956);

Pierce v. *United States*, 86 F. 2d 949, 953 (6th Cir., 1936);
People v. *Jackson* (No. 201, decided Dec. 30, 1959, not yet officially reported), — N. Y. 2d —;
People v. *Lovello*, 1 N. Y. 2d 436 (1956);
People v. *Tassiello*, 300 N. Y. 425, 428-431 (1950);
People v. *Black*, 317 Ill. 603, 148 N. E. 281 (1925);
Balis v. *State*, 137 Neb. 835, 291 N. W. 477 (1940).

United States v. *Spangelet* is directly in point. In that case the Second Circuit—whence the case at bar stems—reversed a conviction in circumstances even less aggravated than in the present case. The defense summation offered the argument that a Government witness who was convicted as a co-conspirator with the defendant had had his bail reduced after he agreed to cooperate, and after he had pleaded guilty, and thus he had "Every motive for lying. . . ." In reply, the prosecutor, in his summation, remarked:

> "'What is your deduction? I assume the deduction was that I made a deal with Gandin's lawyers. I have been in this office for two and a half years and I am going to leave shortly. I have never made a deal with anybody'." (258 F. 2d at 342).

In reversing the conviction because of this erroneous and prejudicial remark, the court pointed out that a jury is apt to repose more confidence in a public prosecutor than in an ordinary lawyer, and it is especially wrong for a prosecutor to put his integrity in issue; the court wrote:

> ". . . the prosecutor represents a 'sovereignty whose obligation is to govern impartially.' *Berger*

v. *United States*, 295 U. S. 78, 88. As *Berger* suggests, this obligation may cause a jury to place more confidence in the word of a United States Attorney than in that of an ordinary member of the Bar. And it is especially inadmissible for the prosecutor to put into issue his own professional integrity, as was done here." (*Id.* at 342).

The court continued:

"We think the prosecutor's conduct here was equally improper; in effect, he gave testimony as to a fact allegedly within his personal knowledge without taking an oath or subjecting himself to cross-examination. *People* v. *Lovello*, 1 N. Y. 2d 436, 136 N. E. 2d 483 (1956)." (*Id.* at 343).

The court's opinion pointed out that the defense argument, to which the improper reply was made, was a proper one:

"Here, however, in order to destroy an inference based on testimony elicited from the government's witness, which the defense quite properly had presented to the jury, the prosecutor made a statement of fact wholly without substantiation in the record." (*Ibid.*).

Finally, the court noted, the attempted cure of the error by the trial judge was ineffectual:

"Finally, the instruction of the trial court as to this point, as quoted above, was obviously insufficient to cure the error. It left with the government the advantage improperly obtained. It even gave the jury the impression that the defendant's counsel rather than the prosecution was being admonished. And since the point involved affected Gandin's credibility

> upon which testimony the government's case depended, we cannot say that the error was harmless." (*Ibid.*).

Every word quoted from the *Spangelet* case is peculiarly apt to the instant case.

The Second Circuit's opinion in *Spangelet* relied on the New York Court of Appeals' decision in the *Lovello* case. There, the prosecutor's improper summation was almost exactly like the last portion of the remarks of the prosecutor in the case at bar:

> " 'Gentlemen, with all the sincerity at my command, I say to you that if that conversation did not take place, in your judgment, you stop right there. Don't waste another ten seconds on this case. Come back and say that this defendant is not guilty. If that conversation did not take place, then I am an aider and abettor to Omark's perjury'." (1 N. Y. 2d at 438-439).

The New York court in reversing, held:

> "We repeat the previous condemnations by ours and other courts of such practices by any prosecutor in making himself an unsworn witness and supporting his case by his own veracity and position (see *Berger* v. *United States*, 295 U. S. 78, 88; *People* v. *Tassiello*, 300 N. Y. 425, 430; *People* v. *Swanson*, 278 App. Div. 846, 847)." (*Id.* at 439).

The trial judge in the case at bar failed to reprimand the erring prosecutor, although "the situation was one which called for stern rebuke and repressive measures" (*Berger* v. *United States*, 295 U. S. 78, 85 [1935]). Further, the trial judge's total failure to correct the prejudicial re-

marks, compels the conclusion that the error is reversible. Thus, in the *Lovello* case the court held:

> "Defendant objected to the prosecutor's improper remarks, but the court indicated to the jury that there was no impropriety. Defendant took adequate exception. Without elaborating on the incident, we hold that it was reversible error." (1 N. Y. 2d at 439).

Another case directly in point is *United States* v. *Tucker*, 267 F. 2d 212 (3d Cir., 1959). There, the court reversed a conviction because of the prosecutor's summation. Just as in the case at bar, the prosecutor sought to make himself an unsworn witness for the prosecution, by explaining the absence of certain persons claimed by the defense to be culpable.

Most significantly, the court dealt with an attempted justification of the offending argument, on the claimed ground that it had been called forth by the defense argument. The court stated that failure to live up to the duty of the prosecution to speak fairly is not excused by the standard of advocacy set by the defense; there are other remedies for impropriety of that sort which may appear, and they are solely the court's perogative.

> "The government seeks to justify the prosecutor's statement to the jury by arguing that defense counsel had asked the jury to draw an unwarranted inference of blameless intent from the failure of the prosecution to prove that there were more extensive deficiencies in this vast project. But if this was an unreasonable inference it would have been proper and would have sufficed for the prosecutor to say so and to explain to the jury why in logic the record did not lend itself to that inference. He might have

> asked, in the light of the defense argument, that the court explain to the jury that the government could properly restrict its charge and proof to a few occasions involving wrongdoing, whether there were or were not any other similar events. *But he could not contradict the suggested inference by adding to the record his own unsworn presentation of additional facts. Even if the defense argument was improper, '[s]imilar latitude in respect to irrelevant matter permitted to counsel for the defendant neither vindicates nor palliates the license assumed by the prosecutors, nor lessens its destructive effect upon the fairness of the trial.'* See *Pierce* v. *United States*, 6 Cir., 1936, 86 F. 2d 949, 953." (Emphasis added; 267 F. 2d at 214.)

The foregoing, we submit, is ample rebuttal to the unfounded suggestion in the opinion below, that the defense summation constituted some sort of provocation, or justification, for the prosecution's remarks (R. 118, folio 1697).

In every case cited above, reversal followed where the trial court either omitted to correct the erroneous remarks of the prosecutor, or where it gave instructions designed to correct the remarks, but failing of their purpose. In the present case, no instruction at all was given. The curt denial of the motion for mistrial, indeed, could only have left the jury with the impression that the defense objection was ill-founded, and that the summation was a proper one. This, of course, was error which requires reversal.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

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Nos. 111 and 122

In the Supreme Court of the United States

OCTOBER TERM, 1959

MAX SCHAFFER AND NORMAN SCHAFFER, PETITIONERS

v.

UNITED STATES OF AMERICA

HYMAN KARP AND BENJAMIN T. MARCO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 111

MAX SCHAFFER AND NORMAN SCHAFFER, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 122

HYMAN KARP AND BENJAMIN T. MARCO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 104)[1] is reported at 266 F. 2d 435. The opinion of the District Court denying the pretrial motion of petitioner Karp for a severance is reported at 158 F. Supp. 522.

JURISDICTION

The judgment of the Court of Appeals was entered on April 21, 1959 (R. 118). A petition for rehearing

[1] "R." refers to the printed record; "Tr." refers to the typewritten transcript lodged with this Court.

was denied on May 18, 1959 (R. 119). The petition for a writ of certiorari in No. 111 was filed on June 11, 1959, and the petition in No. 122 was filed on June 17, 1959. The petitions were granted on October 12, 1959 (361 U.S. 809). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was proper joinder of offenses and defendants as between substantive counts of an indictment so as to permit their proper submission to the jury after the dismissal of a conspiracy count initially charged in the same indictment.

2. Whether the values of individual shipments of stolen goods shipped in interstate commerce to each petitioner were properly aggregated under 18 U.S.C. 2311 and 2314.

3. Whether remarks made by the Assistant United States Attorney on summation, in reply to a defense argument implying a government "deal" in the suppression and control of testimony, were improper.

STATUTES AND RULES INVOLVED

18 U.S.C. 2314 provides, in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

18 U.S.C. 2311 provides, in pertinent part:

> As used in this chapter:
>
> * * * * *
>
> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof.

Rule 8 of the Federal Rules of Criminal Procedure provides:

> (a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> *Relief from Prejudicial Joinder.* If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by

such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

In a trial before a jury in the United States District Court for the Southern District of New York, the petitioners were convicted on separate substantive counts of an indictment charging violations of 18 U.S.C. 2314 for transporting, in interstate commerce, goods of a value in excess of $5,000 known to have been stolen (R. 64a). The petitioners Max and Norman Schaffer, and Hyman Karp were each sentenced to imprisonment for two years and to pay a fine of $10,000. The petitioner Benjamin T. Marco was sentenced to imprisonment for four years and to pay a fine of $10,000 (R. 69a).[2] The court of appeals affirmed.

I

JOINDER

A. THE INDICTMENTS

The indictment was drawn in four counts (R. 5a-7a). Count 1 charged the two Schaffers, together with Anthony, Mario and Dorothy Stracuzza, with transporting stolen merchandise, consisting of ladies'

[2] Two other defendants named in the indictment, Anthony and Mario Stracuzza, who had entered pleas of guilty prior to trial, were each sentenced to imprisonment for five years on this and two other indictments, the sentences to run concurrently and to be suspended (R. 69a). A seventh defendant, Dorothy Stracuzza, was granted a severance as to trial and the charges were dismissed thereafter.

and children's wearing apparel, from New York to Lebanon, Pennsylvania, during the period May 15, 1953 to July 27, 1953. Count 2 charged Benjamin T. Marco and the Stracuzzas with a similar movement of like goods from New York to Bluefield, West Virginia, from June 11, 1953 to July 27, 1953, and Count 3, charged Hyman Karp and the Stracuzzas with transporting such goods to Fall River, Massachusetts, from May 21, 1953, to July 27, 1953. The fourth count charged all the parties with a conspiracy to commit the substantive offenses (R. 6a). A second indictment, under which the petitioners went to trial at the same time, alleged in a single count a conspiracy of all the named parties to violate 18 U.S.C. 659 by receiving and concealing goods stolen in interstate commerce.

Prior to trial, the petitioner Karp moved for a severance on the ground that he would be prejudiced by being tried with Anthony and Mario Stracuzza (who had at that time entered pleas of guilty to a separate indictment) and with Benjamin T. Marco (who had a criminal record). The motion was denied. *United States* v. *Stracuzza*, 155 F. Supp. 522 (S.D.N.Y.).

B. THE EVIDENCE

The evidence, insofar as pertinent here, was as follows:

1. Anthony Stracuzza, the principal government witness, testified that, in 1952, he had worked in the offices of Eisenberg and Berk, and later, in early 1953, in an association with Mr. Berk alone, where he handled wearing apparel. Truck drivers would bring in

quantities of packaged apparel and loose garments to the offices. Mr. Stracuzza would change the tags on the loose dresses and deliver them to various customers in the garment area. All children's wear was resealed in boxes and addressed to be delivered by express to a Mr. Karp in Fall River, Massachusetts (R. 22–23, 31). It was in the Eisenberg offices that Mr. Stracuzza, in 1952, first met the petitioners. He saw them all come in at various times. He saw them examine for selection the merchandise which the truck drivers had brought in as well as the invoices that accompanied the deliveries. The Schaffers came in every week or ten days (R. 39–40). On one occasion they were there at the same time as Mr. Karp (R. 100). Mr. Marco came in once during this period; he picked out certain merchandise which Mr. Stracuzza immediately packed for express to Bluefield, West Virginia (R. 21–22, 29). In May 1953, Anthony Stracuzza, assisted by his brother Mario, opened up his own place of business under the name A. Shaffer (R. 46). They would buy packages of merchandise from truck drivers in the garment district (R. 50, 51). In May, Anthony Stracuzza accosted the Schaffers as they were leaving the Eisenberg offices. He told them he was in business for himself, that he would like to do business with them, and that he could give them good merchandise. Shortly thereafter, the Schaffers came to Mr. Stracuzza's office and examined the merchandise and the manufacturer's bills (R. 55–56). The Schaffers agreed to pay 65% of the manufacturer's invoice price (R. 52). From this time until July 28, 1953,

they came in every week or ten days to examine merchandise, preferably coats, suits and dresses, and the accompanying manufacturers' invoices (R. 54–55, 57). The merchandise was sent to Lebanon, Pennsylvania, through U.S. Packing and each package included, not only Mr. Stracuzza's bill, but the manufacturer's invoice. It was Mr. Stracuzza's practice to copy all the information on the manufacturer's invoice as to style, quantity, etc., on his own bill. As to the manufacturer's bill he would cut off the name of the consignee, leaving the manufacturer's name on the bottom of the invoice (R. 59–62).

In May, Mr. Stracuzza also called Mr. Karp, and offered to do business with him. After some wrangling over prices, it was agreed that Mr. Karp would pay 55% of the manufacturer's price listed on invoices to be sent with the shipments (R. 52–53, 60). Mr. Karp said, "You can start shipping" (R. 53). From this time until July 28, 1953, merchandise was shipped to Mr. Karp in Fall River, Massachusetts, by Railway Express. Each package included the manufacturer's invoice (R. 47, 53, 61). At one time Mr. Karp telephoned from Fall River to ask Mr. Stracuzza if he had protection in New York (R. 68–69).

In June 1953, Mr. Stracuzza called up Mr. Marco, identified himself as having worked with Eisenberg and Berk, and arranged to make sales to him. Mr. Marco said, "All right, you can start sending" (R. 48). Thereafter until July 28, 1953, merchandise was sent to Mr. Marco in Bluefield, West Virginia, by Railway Express. The price was 60% of the manufacturer's invoice which was always enclosed (R. 54–55,

61, 62). During this period Mr. Marco came to Mr. Stracuzza's place of business upon three occasions (R. 73). At times he complained about getting too much of one style or price range, and Mr. Stracuzza said that he could not break up the packages but sold them as he received them (R. 74–75).

Mr. Stracuzza identified records and checks showing the transactions with the various petitioners which formed the basis of the indictment (Tr. 408, 450–457).

2. Other testimony may be summarized briefly as follows:

F.B.I. agents testified as to surveillance made of the Stracuzza premises and their observations of cartons addressed to the petitioners (Tr. 830–833, 893).

An F.B.I. photographer, using a telescopic lens, took pictures of Max Schaffer on the Stracuzza premises between 11:15–12:15 on July 28, 1953 (R. 82–84). When Mr. Schaffer was apprehended there at 4 p.m. on the same day, he denied that he had ever done business or visited there (R. 87).

Agents testified that, on the day of Mr. Stracuzza's arrest, they recovered on his premises a number of original manufacturers' invoices and a sealed carton of merchandise addressed to Mr. Karp containing such invoices (Tr. 836). An agent testified that Mr. Karp had admitted that he had done business with "Tony" as well as Eisenberg and Berk (Tr. 1126–1131).

Employees of Mr. Marco testified that they cut labels from wearing apparel (R. 90) and sewed in labels (R. 92), and that the apparel was sold at much less than the price charged by other stores (R. 91).

Mr. Marco once said that the merchandise was stolen, but it was thought he was joking (R. 89–90).

Stipulations were entered into by each of the petitioners to the effect that manufacturers if called would identify the garments which they manufactured, and that various United States Marshals would testify that clothing in their possession was recovered from the various premises of the petitioners (R. 20a–21a; Tr. 1438–1444).

C. THE RULINGS

The conspiracy counts (*i.e.*, the separate indictment and count 4 of the present indictment) were dismissed at the close of the evidence at the trial, the court noting that the question would have been closer if there was a charge of separate conspiracies between each defendant and the Stracuzzas (R. 12a). Counsel for Mr. Karp then argued, in support of a motion to acquit, that the evidence introduced against the other defendants had resulted in fatal prejudice to him (R. 14a). The court noted that the evidence "can be very easily segregated" (R. 13a, see R. 14a). The court subsequently explained to the jury that the conspiracy count had been dismissed and that various exhibits and testimony admitted at first only against one defendant would be limited to that defendant (R. 19a–20a).

In his charge, the trial judge said (R. 50a–51a):

> Now, the posture of the case as it is being submitted to you today is, as I explained to you on Thursday, considerably different than when it started. The only questions that you are concerned with are the guilt or innocence of each defendant as they are separately charged

in Counts 1, 2 and 3 of the indictment, No. 145-232.

* * * * * *

You are limited, in fact you are required to consider the evidence against each defendant separately and as it relates to him under the particular charge of which he stands accused. That is, you are not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant. In short, even though there are four defendants on trial, as against each you must consider only the eveidence that relates to him; and not view it as a sum total of all the evidence merely because they are charged in one indictment and have stood trial together.

In affirming the convictions, the Court of Appeals held that there was proper joinder for trial at the outset of the proceedings, that this would not have been true but for the conspiracy count, but that the mere fact that the conspiracy count had been dismissed at the close of evidence was not ground for reversal in the absence of a showing of prejudice. It noted that the record revealed no basis for a claim of prejudice since the issues were not complex and a number of precautionary measures were taken to keep the issues as to each defendant separate (R. 112-115).

II

THE EVIDENCE AND CHARGE RELATIVE TO THE VALUE OF SHIPMENTS

Among the stipulations at the trial was the following, entered into by each of the petitioners in identical

form and substance (except as to applicable differences in place and date):

> It is hereby stipulated and agreed by and among the defendants Max Schaffer and Norman Schaffer, and their counsel, Irving W. Coleman, and the United States of America * * *
>
> * * * * * *
>
> 3. That the aggregate value of the merchandise consisting of ladies' wearing apparel, which was transported from the Southern District of New York to Lebanon, Pennsylvania, to the defendants Max Schaffer and Norman Schaffer, during the period from on or about May 15, 1953, up to and including July 27, 1953, was in excess of $5,000. Each shipment was a value of less than $5,000 [R. 20a–21a].[1]

The trial judge expressed concern as to the meaning of the provision of the statute that the jurisdictional amount could be based on the "aggregate value" of the merchandise referred to in an indictment (R. 16a). He was of the view that "the one indictment means the one charge, so that it is three separate counts relating to the three groups of defendants" (R. 16a). And, in that connection, the judge said he was going to assume the defendants were making a motion for a directed verdict of acquittal as to the substantive counts and was reserving decision on the motion (R. 18a–19a; see R. 21a).

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[1] For the stipulation by Benjamin T. Marco, see Tr. 1438, 1439; and for Karp, see Tr. 1440, 1441. The actual value of these shipments to the various petitioners totalled $19,531.52 to the Schaffers (Tr. 986), $17,175.24 to Karp (Tr. 1135), and $23,080.14 to Marco (Tr. 1066).

The court charged (R. 58a):

> One of the other elements of the crime charged against each defendant, and an important element, since without it the crime does not rise to the dignity of a federal crime, is that the Government must prove that the shipments of the stolen merchandise were in excess of $5,000. In this connection, the stipulation between the attorneys states that the total shipments covered by each count are in excess of $5,000. The statute that Congress passed says, "The aggregate value of all goods and merchandise referred to in a single indictment shall constitute the value thereof." This means that under each count addressed to each defendant and to the Schaffers jointly, you may rely on the stipulation, in so far as value is concerned, that the value of the goods and merchandise, exceeded the sum of $5,000, even though no individual shipment was of a value that high.

In affirming the conviction, the Court of Appeals noted that Congress intended to permit aggregation of a series of transactions. It said it need not decide what ruling should be made in a case where transactions are truly separate and distinct since here the proof made clear that as to each appellant there was a sufficient unity for the purpose of the statute (R. 109–110).

III

THE SUMMATIONS

In the summations to the jury, defense counsel argued the lack of proof of guilty knowledge. Counsel for the petitioner Karp, commenting upon evidence which he charged came from a tainted source, charac-

terized the government's main witness, Anthony Stracuzza, as a liar, a perjurer, a thief and a loan shark "who has made his peace with the Government, and who is determined to help the Government in any way he could, because that is the way he is going to help himself and his wife and his brother." (Tr. 1471–1472.) Noting that the government had arrested the wife, Dorothy, and the brother, Mario, of the witness, counsel inquired "Where were Mario and Dorothy in this case?" After objections to this line of argument were overruled by the court, counsel continued in part (Tr. 1472–1477):

> I say, where were Mario and Dorothy. * * * Dorothy was indicted in this case as a defendant. But before the trial the District Attorney severed the case, which means that she doesn't go on trial, and he admitted to you that in a previous indictment involving the three Stracuzzas and some thieves, he similarly severed the case, so she didn't have to appear there.
>
> That is a nice way to treat a lady—don't put her to any inconvenience. You don't put her on trial; you don't try her for the crimes she may be charged with by the grand jury; and when you don't call her to the witness stand, she is not cross-examined by these nasty defense lawyers, who want to ask embarrassing questions.
>
> * * * * *
>
> Is that one of the benefits that accrues to a witness for the government in this case, to have his wife [tenderly] dealt with?
>
> What other benefits accrue to such a witness? * * *

Why hasn't he been sentenced, ladies and gentlemen? Incidentally, Mario got the same treatment on the same occasion, at the same time. He came in, pleaded guilty to this indictment, pleaded guilty to the other indictment, and he hasn't been sentenced.

Why haven't they been sentenced, ladies and gentlemen? Is it because when you have a prospective witness and the sword of Damocles hangs over his head, it is then the power of the Assistant District Attorney to make a recommendation to the Court? Is it because when a witness has hanging over him the possibility of going to jail, that he bestirs himself a little more on behalf of the side that has that power?

I have no power to do anything here. I have no power to make recommendations to the Court. I won't be heard. But he has the power.

Apprising the jury of another crime of stealing of which Anthony Stracuzza had been convicted, counsel for Mr. Karp continued (Tr. 1482):

* * * He got a suspended sentence on the recommendation of a District Attorney who sits here. * * *

Now, that is nice treatment; that is nice treatment, and something anybody in his right mind would want, and it sheds a little more light on Mr. Stracuzza and his motives in testifying, and the weight you can give his testimony, and whether he was here to help you arrive at the truth, or whether he was here to fool you, to do anything he could so that he'd get his 30 pieces of silver.

The Assistant United States Attorney prefaced his summary with brief remarks addressed to these implications. He noted that Dorothy Stracuzza was still a defendant against whom charges were open, and that Mario Stracuzza had not been called by the Government for the reason that, since the testimony of an FBI agent confirmed that Mario and Anthony were interviewed on each and every occasion together and had given a joint story, the testimony of Mario would have been merely repetitious of that given by Anthony (R. 22a–23a). He then said (R. 23a):

> Now, in making these comments as to the conduct of the prosecution, there was some criticism as to the extent that the Government failed in its obligation to its citizens to bring out all the facts. I say to you as an assistant United States attorney, my job is not to convict people, but is to bring them here in court, give them a fair chance to meet the charges that the Government has presented against them.
>
> The motto on the building of the Department of Justice in Washington I think fairly indicates the attitude of the Government, as far as its citizens are concerned. It reads:
>
> "The Government wins when justice is done its citizens in the court."
>
> Now, of course, if you believe that the Government has in some way or other prevented you from getting the full truth of this entire case, that it in some way here concealed the true facts pertaining to any of these defendants, you have only one duty—you have to march right into that juryroom and acquit every one of these defendants.

The court overruled a motion for withdrawal of a juror on that remark (R. 24a).

The Court of Appeals held that the prosecutor's comments on summation constituted no more than a legitimate and proper answer to an argument advanced by defense counsel (R. 117–118).

SUMMARY OF ARGUMENT

I

There was proper joinder, for indictment and trial, of both offenses and defendants in this case. A conspiracy count naming the petitioners jointly was not an indispensable nexus to that joinder since the substantive counts constituted a series of related offenses in which all of the petitioners participated. The failure of the conspiracy count at the trial, therefore, had no bearing on the propriety of the submission of the substantive counts to the jury; they were subject to joinder with or without the conspiracy.

A. The three substantive offenses, charging the petitioners with transporting stolen goods in interstate commerce, were properly joined without the conspiracy count under the Federal Rules of Criminal Procedure and the case law. Considered without regard to the number of defendants, they were subject to joinder on any one of three alternative grounds set forth in Rule 8(a)—as offenses of the same or similar character, or offenses based on transactions connected together, or offenses constituting part of a common scheme or plan.

As to the joinder of defendants, Rule 8(b) permits such joinder if the accused participated either in the

same act or transaction or the same *series* of acts or transactions constituting an offense or offenses. The language and history of Rule 8(b) support the view that its framers adopted the practice of the more liberal judicial decisions in permitting defendants who participated in a series of acts or transactions to be named as separate defendants in separate counts as well as joint defendants in one or more counts. A series of transactions was contemplated as a series of acts or offenses constituting similar criminal activity coupled with connecting factors, such as time or place, or pattern of conduct or plan, which result in the relevancy or dependency of proof as between such acts or offenses. The existence of a conspiracy was not considered a prerequisite to joinder.

The substantive counts in this case alleged a series of transactions. They charged in almost identical language that each of the petitioners, together with the Stracuzzas, violated the same criminal code provision in the same period of time by shipping stolen goods from the same place. The Stracuzza scheme of operation was apparent from the allegations in each count and such scheme was a necessary part of the proof as to each count. Each petitioner was a part of the scheme—a participant in a series of transactions. Each was therefore properly named in a separate count.

The cases decided since the adoption of the Rules have found joinder proper in analogous situations.

B. Even if the dismissal of the conspiracy charge impaired the joinder of the substantive offenses, the petitioners would not, in the absence of a showing of

prejudice, be entitled to reversal. There is no basis for any implication that the conspiracy count was included merely to add propriety to what would otherwise have been improper. The original belief that all the defendants were members of a single conspiracy, although not established at the trial, was not unreasonable under the facts of this case.

Prejudice is the only guidepost for a court in determining the right to relief from misjoinder arising during trial. Rule 14, F.R. Crim. P. Reversal for misjoinder must rest on a showing of prejudice.

There was no prejudice here. The evidence was developed in orderly, systematic fashion so as to be easily followed and readily referable to the defendant to whom it applied. With virtually every offer of proof, an instruction was requested and given that it was admitted with respect to a particular defendant and was not to be considered with respect to others. Since the conspiracy count was dismissed at the end of the government's case, the defendants were not denied an affirmative defense because of a fear that evidence offered as to one could be imputed to the others. The dominant issue as they chose to meet it was a simple one—that of intent.

The court in its charge to the jury made the issues clear, reviewed the evidence separately as to each of the defendants, and admonished the jury to consider the evidence against each defendant separately as it related to him under the particular count under which he was charged. The jury could not have been confused.

II

The requirements of the statute that the aggregate minimum value of the shipped stolen goods *referred to in a single indictment* be $5,000 for the purposes of federal jurisdiction were met in this case. Each count of the indictment, none of which was attacked at any time as duplicitous, alleged that each petitioner transported goods over a period of time. Each petitioner stipulated that the total value of the shipments during the period charged in the count applicable to him was over $5,000, even though the value of each individual shipment was less. The court properly charged the jury that they could rely on the stipulations that the total value shipped in each count was $5,000. We need not consider what would have been the question had there been any attempt to aggregate the values of all the counts. It is clear here that the shipments, so related as properly to form the basis of a single count against each petitioner, have sufficient unity of purpose to justify aggregation under the statute.

The language and legislative history of the statute show that Congress in setting a minimum jurisdictional value did not want the Department of Justice to be burdened with numerous small violations. Congress was not unaware, however, that a serious violator might attempt to avoid federal prosecution by moving a series of single shipments each of which was under the statutory minimum; it thus provided for the aggregation of the values referred to in the indictment. The language of the congressional reports is replete with references to the fact that this proviso authorizes federal jurisdiction in the event that a defendant is

charged with a *series* of violations. The word "series" is significant; it is not the same as a "single plan or agreement." If the acts were sufficiently related so as to justify joinder in one indictment, their values could be aggregated.

The petitioner argues that the Court of Appeals sustained the convictions on the basis of findings of fact made by it which were not submitted to the jury. However, such findings are not necessary to uphold the judgment since the instructions of the trial court were correct in not submitting the question of value to the jury, but itself determining the propriety of adding together the value of the shipments on the basis of the legality of the joinder of transactions in the individual counts.

III

The remarks of the Assistant United States Attorney on summation, made in reply to argument of defense counsel implying that the government had made a deal to color and suppress testimony, were not improper. In spite of provocation, the prosecutor injected no personal protestations in defense of himself, or his witness, that would have confused the issue of innocence or guilt, or that would have placed the prestige of his office on the side of the credibility of the testimony being attacked. He likewise made no personal representations outside the record that could be characterized as unsworn testimony. His remark that the government wins when justice is done, and his admonition that the jury should acquit if it believed the government had concealed the facts, were a legitimate response to the argument made by the defense.

ARGUMENT

I

THERE WAS PROPER JOINDER OF OFFENSES AND DEFENDANTS

The initial issue is whether there was improper joinder of offenses and defendants in one indictment. The petitioners do not contend that the joinder here was improper at the outset of the trial. They argue rather that prejudicial error resulted as a matter of law when the three substantive counts were submitted to the jury after the dismissal of the conspiracy count. This argument, with overtones of variance, is predicated upon the assumption that the conspiracy count was an indispensable "nexus" to the validity of the indictment in the first instance (as the court below thought) and that its dismissal at the close of the prosecution's evidence was fatal to the case, a position which the court below rejected in the absence of a showing of prejudice.

It is our position that the joinder of the three substantive offenses, and the resulting joinder of defendants, was proper initially under the Federal Rules of Criminal Procedure and the case law—with or without the conspiracy count. The submission, therefore, of the three substantive counts to the jury raised no issue of misjoinder, and there is therefore no basis for reversal on that ground. Moreover, there was no showing of prejudice.

Before developing this position, we think it well to clarify one preliminary point which the petitioners discuss (No. 111, Pet. Br. p. 24). The petitioners did

not make a motion for a mistrial after the conspiracy count was dismissed. As noted in the Statement, the petitioners, in arguing for judgment of acquittal on the substantive counts, urged that evidence admitted against one defendant alone would be prejudicial to the others (R. 14a). But what the petitioners were seeking was a judgment of *acquittal,* a judgment that they go free, not that each have a new trial separately. We need not endeavor to decide whether the petitioners would have had a defense of double jeopardy if the trial judge had, on his own motion, decided to grant a new trial at that time because of misjoinder of offenses. It is clear enough that in such event there would have been more of a problem of double jeopardy than if the petitioners had themselves moved for a new trial. The absence of a motion for a new trial is therefore a factor to be considered in determining whether the trial court committed prejudicial error in continuing the trial.

Our basic argument, however, rests not on the petitioners' failure to move for a new trial, but on the propositions that the joinder of offenses was proper in the first instance and that in any event the courts below properly found that there was no prejudice as the result of the joinder.

A. THE SUBSTANTIVE COUNTS COULD PROPERLY HAVE BEEN JOINED IN ONE INDICTMENT IN THE FIRST INSTANCE WITHOUT THE CONSPIRACY COUNT

1. *Joinder of offenses*

There is no question that three or four separate criminal offenses may under certain circumstances properly be charged in one indictment. This is the

literal meaning of Rule 8(a) of the Federal Rules of Criminal Procedure which authorizes the charging in one indictment of two or more offenses in a separate count for each offense "if the offenses charged * * * are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."

This rule substantially restates what was existing law as to joinder of offenses at the time of its adoption[4]—law which itself restated what had been the practice in the early American and English courts. See *Pointer* v. *United States*, 151 U.S. 396, and cases cited. The rule permits the joinder of felonies or misdemeanors or both. The offenses may be all substantive crimes. *Ibid.*; *Dunaway* v. *United States*, 205 F. 2d 23 (C.A.D.C.). They may be conspiracies and substantive offenses. *Curley* v. *United States*, 160 F. 2d 229 (C.A.D.C.), certiorari denied, 331 U.S. 837; *Pinkerton* v. *United States*, 151 F. 2d 499 (C.A. 5), affirmed, 328 U.S. 640. They may be related conspiracies. *United States* v. *Cohen*, 145 F. 2d 82 (C.A. 2), certiorari denied, 323 U.S. 799; *United States* v.

[4] Section 1024 of the Revised Statutes (18 U.S.C. (1940 ed.) 557, repealed by the Act of June 25, 1948, 62 Stat. 862) provided as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

Perlstein, 120 F. 2d 276 (C.A. 3), certiorari denied, 316 U.S. 678; *McNeil* v. *United States*, 85 F. 2d 698 (C.A.D.C.). The only requirement is that they be offenses of the same or similar character (*Pointer* v. *United States, supra*, 151 U.S. 396), or be based on the same act or transaction (*Cataneo* v. *United States*, 167 F. 2d 820 (C.A. 4)), or based on two or more acts or transactions connected together or constituting parts of a common scheme or plan (*Rakes* v. *United States*, 169 F. 2d 739 (C.A. 4), certiorari denied, 335 U.S. 826). In this latter respect the connecting link need not be a conspiracy, or even a scheme. Common factors as to time, place, and occasion may link offenses. See *Pointer* v. *United States*, 151 U.S. 396.

Measured by these principles—and passing for the moment the question of the number of the defendants and the acts performed by each—the offenses here are within the class of crimes subject to permissible joinder, on any one of three alternative bases. The substantive offenses were of the same or similar character. Each count charged a violation of the same criminal code provision prohibiting the transportation in interstate commerce of goods known to be stolen. Moreover, the offenses were based on two or more acts or transactions connected together. The transactions were made with the same party, the Stracuzzas, were carried out in approximately the same period of time, and originated from the same place. Lastly, these offenses were based on transactions constituting parts of a common scheme or plan by the Stracuzzas to sell stolen merchandise at discount rates.

Unquestionably as to the offenses as such, joinder was proper. Thus if the Stracuzzas, who were named

as defendants in each of the substantive counts, had been tried under these three counts, they could not have claimed misjoinder. And since the offenses as such were properly joined, we think that they could properly be tried together even though different defendants were also named in each count.

2. *Joinder of defendants*

Rule 8(b) of the Rules permits the joinder of two or more defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." It provides further that such defendants may be charged in one or more counts together or separately and that all of the defendants need not be charged in each count.

Under the literal wording of the Rule, joinder of two or more defendants is contemplated in two types of situations—first, if they participated jointly in one act (or transaction) or, second, if they participated in any one of a series of acts (or transactions). The word "series" implies a connected, but not necessarily an integrated, relationship. There must be some vinculum between the acts which constitute the alleged offenses. But once the connection exists, joinder is proper if the defendants named participated, even separately, in any one of the acts of the series. This interpretation is supported by the history of Rule 8(b), as gleaned from the Notes of the Advisory Committee, and the subsequent development of judicial law.

In contrast to Rule 8(a), Rule 8(b) had no federal statutory heritage. The status of the federal law

on this subject before the adoption of the rule was confused. At common law, defendants who participated in the same offense and in some instances who committed related offenses could be indicted jointly in the same count or counts of an indictment or separately in different indictments at the option of the prosecuting authority. 2 Bishop, *Criminal Procedure* (2d ed. 1913) §§ 463, 473, 474.[1] Thus in *Redman* v. *State*, 1 Blackf. 429 (Indiana), the court sustained an indictment which in separate counts severally charged one defendant with larceny, and another with receiving the stolen goods, knowing them to be stolen. The court noted that the two crimes were of the same nature, required the same plea, the same judgment, and the same quantity of punishment.

In the federal courts, the case of *Pointer* v. *United States*, 151 U.S. 396, noted above p. 23, *supra*, upheld

[1] For the English law on the subject see Chitty (1 Cr. L. 270, 254):

"Several offenders may also, for different offences of the same kind, be in some cases included in the same indictment, the word 'severally' being inserted, which makes it several as to each of them, though the court will, in its discretion, quash the indictment if any material inconvenience appear to rise from the mode in which it is preferred. Thus, it has been holden that four persons may be joined for erecting four inns, which prove to be common nuisances, if the word 'severally' be inserted, though the want of that word will vitiate, and the same rule applies to the keeping of disorderly houses, the same term being inserted. But it seems that to warrant such joinder, the offences must be of the same nature, and such as will admit of the same plea and sentence, or it may operate like a misjoinder in civil proceedings, and be bad upon demurrer, or after a general verdict, in arrest of judgment. In all these cases, however, the charge is several against each individual, and the jury may acquit some, while others are found guilty."

See also *Rex* v. *Kingston*, 8 East 41, 46.

the statutory practice of joining, in different counts of the same indictment, different felonies of the same general nature. The decision in *McElroy* v. *United States*, 164 U.S. 76, was, however, interpreted as casting doubt on the validity of joinder involving more than one defendant. In that case the Court reversed convictions where there had been consolidation of four indictments charging separate offenses totally unrelated to each other—two of arson and two of assault with intent to kill—and where six persons were named in three of the indictments and only three of the six persons were named in the remaining indictment. The Court reaffirmed the general rule of *Pointer*, *supra*, but concluded that "such joinder cannot be sustained where the parties are not the same and where the offences are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them" (164 U.S. at 81).

Following this, in *United States* v. *Dietrich*, 126 Fed. 664 (C.C.D.Neb.), it was pointed out that, while federal law had discountenanced, in *McElroy* v. *United States*, *supra*, the joinder in one indictment of defendants charged in several counts with independent offenses not part of the same transaction or connected together, the question was an open one as to whether two or more defendants could be in the same indictment severally charged with distinct and several offenses of the same time and place, and forming parts of the same transaction. Circuit Judge Van Devanter, speaking for the court, said (126 Fed. at 670):

> Much can be said in support of a practice which, subject to a discretion invested in the

> court to enable it to do justice between the government and the accused, permits two or more defendants to be in separate counts of the same indictment severally charged with distinct and several offenses of the same class and grade, and subject to the same punishment, where the offenses appear to have been committed at the same time and place and to form parts of the same transaction. Under such circumstances the proof in respect to one offense would almost necessarily throw light upon the other or others, and the connection between them would frequently be so close that it would be difficult or impossible to separate the proof of one from the proof of the other or others. * * *

By the time the Rules were adopted, federal decisions generally permitted two or more defendants to be named as joint defendants in a count or counts of an indictment if they had cooperated in the offense or had been under a joint legal duty. *Dillon* v. *United States,* 113 F. 2d 334 (C.A. 8), certiorari denied, 311 U.S. 689; *United States* v. *Interstate Properties,* 153 F. 2d 469 (C.A.D.C.); *Marcus* v. *United States,* 20 F. 2d 454 (C.A. 3). Cooperation was easily found in the case of a scheme or conspiracy, *Sasser* v. *United States,* 29 F. 2d 76 (C.A. 5), certiorari denied *sub nom. Russell* v. *United States,* 279 U.S. 836. Where there was no joint action, some decisions, citing *McElroy* as an authority, prohibited joinder either in the same count or separate counts. *Castellini* v. *United States,* 64 F. 2d 636 (C.A. 6); *DeLuca* v. *United States,* 299 Fed. 741 (C.A. 2). In other circuits the practice was of a much more liberal na-

ture. In the Fifth and Seventh Circuits, for example, defendants who had participated in the same transaction or transactions could be joined in the same indictments as separate defendants in separate counts as well as joint defendants in one or more counts. *United States* v. *Tuffanelli,* 131 F. 2d 890 (C.A. 7), certiorari denied, 318 U.S. 772; *Morris* v. *United States,* 128 F. 2d 912 (C.A. 5), certiorari denied *sub nom. Lacy* v. *United States,* 317 U.S. 661; *Caringella* v. *United States,* 78 F. 2d 563 (C.A. 7); *Todd* v. *United States,* 48 F. 2d 530 (C.A. 5).

There was also respectable authority to the effect that, once it had been determined that the requirements of the joinder and consolidation statute were met (Rev. Stat. 1024, *supra,* p. 23, fn. 4), differences among defendants were not objectionable. *Davis* v. *United States,* 12 F. 2d 253, 256 (C.A. 5), certiorari denied, 271 U.S. 688; *Caringella* v. *United States,* 78 F. 2d 563, 567 (C.A. 7); *United States* v. *Smith,* 112 F. 2d 83 (C.A. 2); *Firotto* v. *United States,* 124 F. 2d 532, 535 (C.A. 8). (See also the opinion of Judge Learned Hand in *United States* v. *Liss,* 137 F. 2d 995 (C.A. 2), certiorari denied, 320 U.S. 773, where it was observed that the language of the joinder of offenses statute (18 U.S.C. 557, p. 23, *supra*) presupposed that transactions might be independent of each other and that the mere fact that the accused were different in two counts was no longer important despite what was said in *McElroy.*)

It was the more liberal practice that the Federal Rules of Criminal Procedure adopted. The Notes of the Advisory Committee (see Second Preliminary

Draft, p. 37) quoted with approval the language of Judge Van Devanter (*supra*, pp. 27–28) in *United States* v. *Dietrich*, *supra*, and stated that the rule would now permit joinder in the instance illustrated by that decision (separate offenses charging one defendant with agreeing to receive a bribe and another with agreeing to give such bribe). See also *United States* v. *Geare*, 293 Fed. 997 (C.A.D.C.). The Advisory Committee used this illustration (*ibid.* at p. 36): "The rule would permit defendants A and B, after participating in * * * offenses as described * * * to be charged in the same indictment in the manner indicating their respective participation, as follows:

* * * * *

(2) In an indictment containing more than one count:

* * * * *

(b) In Count 1, A may be charged separately, in Count 2, B may be charged separately, and in Count 3, A and B may be charged together (and other defendants also may be joined).

The Notes state that the provision permitting the joinder of defendants who are charged with offenses based on the same series of acts or transactions "is based on the present law" (*ibid.*, p. 37), and cases are cited as illustrative of this law. We may look therefore to these cases to determine the meaning of a series of acts or transactions (as used in Rule 8(b)). From these, it is evident that the Advisory Committee intended to apply the more liberal rule.

In *United States* v. *Tuffanelli*, 131 F. 2d 890, 894 (C.A. 7), the substantive counts of an indictment

(nolle prossed as to some of several defendants on trial) charging distinct violations of federal liquor laws were characterized by the court as "counts [which] charged closely related offenses, based upon a series of transactions constituting a preconceived system and plan to defraud the United States of the revenue imposed on distilled liquor." In *United States* v. *Cohen*, 124 F. 2d 164, 165 (C.A. 2), certiorari denied *sub nom. Bernstein* v. *United States*, 315 U.S. 811, two counts which charged four defendants jointly with distinct offenses of illegal concealment and transportation of separate quantities of morphine were characterized as a charge which "results from the same series of acts." And in *Todd* v. *United States*, 48 F. 2d 530, 532 (C.A. 5), the court found "one series of transactions" in an indictment which charged two men in three substantive counts with separate allegations of unlawful possession of liquor on the same day and place, and jointly with unlawful maintenance of a common nuisance, a building where alcohol was illegally kept in the same city and on the same day. In *Firotto* v. *United States*, 124 F. 2d 532, 535 (C.A. 8), the court found that acts and transactions involving possession and sale of counterfeit notes participated in by various defendants during a fairly definite period of time and alleged in three indictments (only one of which included a conspiracy count) were "connected together" so as to permit the consolidation of the indictments for trial. See also *United States* v. *Smith*, 112 F. 2d 83 (C.A. 2), approving the consolidation for trial of crimes of the "same class" alleged in four indictments, one charging a conspiracy, the other substantive offenses relating to the

importation, harboring, transportation and maintaining for purposes of prostitution, of alien girls in the United States, and *Morgan* v. *United States*, 98 F. 2d 473 (C.A. 8), certiorari denied, 305 U.S. 648, finding proper joinder of two defendants "closely associated" in transactions alleged in a seven count indictment for mail fraud.

These cases confirm that there is a series of transactions within the purview of Rule 8(b) if there is similarity of the criminal activity alleged in each transaction, coupled with factors which imply the relevancy or dependency of the proof as between transactions. A connecting factor may be closeness of time or place, or it may be a pattern of conduct or plan conceived by one or more, but not necessarily all, of the defendants. In this last example, it is necessary only that a defendant should have participated in one or more of the transactions forming a part of the plan or pattern to be subject to joinder. It is important to note that at least three of the cases reviewed by the framers of the Rules did not contain conspiracy counts; in not one instance did the existence or nonexistence of a conspiracy have a bearing on joinder.

For these reasons, we think that the court below, while correct in finding that the petitioners were properly joined as defendants, was nevertheless in error when it concluded that this joinder was proper only because of the conspiracy count (R. 112). For if the substantive counts comprise a series of acts or transactions, it follows that the petitioners who participated in any *one* of the members of the series could

be named in the same indictment in a count charging that member.

We think it clear that the substantive counts did allege a series of transactions. As noted above, pp. 4–5, *supra*, the substantive counts alleged in almost identical language and pattern that petitioners Max Schaffer, Norman Schaffer, Benjamin Marco and Hyman Karp transported, together with the Stracuzzas, in interstate commerce goods known to have been stolen, as follows:

Count 1—Stracuzzas, Schaffers..... violation of 18 U.S.C. 2314, 2.
Count 2—Stracuzzas, Marco..... violation of 18 U.S.C. 2314, 2.
Count 3—Stracuzzas, Karp..... violation of 18 U.S.C. 2314, 2.

On the face of the indictment, the offenses were recognizable as part of a pre-conceived plan. This is apparent from the allegations revealing the defendants Stracuzzas in New York which are common to each count, the reiteration in each offense of the shipments of stolen goods all originating in New York at about the same time and all ending on the same date. The Stracuzza scheme of operation was a necessary part of the proof as to each substantive count. While we do not quarrel with the district court's holding that this central nexus did not involve all the defendants in a single conspiracy, we think it was enough of a nexus to fall within the purview of Rule 8(b) and permit the joint trial of these defendants on separate substantive charges. Compare the rationale of the cases discussing the practicality of joinder of offenses charging theft of goods and receipt or possession of the same goods with guilty knowledge. *Caringella* v. *United States*, *supra*, 78 F. 2d 563 (C.A. 7); *Davis* v. *United States*, *supra*, 12 F. 2d

253 (C.A. 5), certiorari denied, 271 U.S. 688; *Redman* v. *State, supra,* 1 Blackf. 429 (Indiana); *Commonwealth* v. *Darling,* 129 Mass. 112.

The cases decided since the adoption of the Rules confirm that Rule 8(b) authorizes joinder in analogous circumstances—significantly, in factual situations where there is an absence on an overall conspiracy. Thus in *United States* v. *Rosenfeld,* 235 F. 2d 544 (C.A. 7), certiorari denied, 352 U.S. 928, one six count indictment charged a contractor and his salesmen with wilful misrepresentations to a federal agency and individual conspiracies to defraud the United States, as follows:

Count 1—C & Ros	18 U.S.C. 1010.
Count 2—C & Ros	18 U.S.C. 371.
Count 3—C & W	18 U.S.C. 1010.
Count 4—C & W	18 U.S.C. 371.
Count 5—C & Rob	18 U.S.C. 1010
Count 6—C & Rob	18 U.S.C. 371.

Salesman Rosenfeld, convicted on count 2, urged on appeal error in joinder (counts 3 and 4 were severed for trial). The Court of Appeals for the Seventh Circuit held that Rule 8(b) was a standing refutation of such an argument, saying "a clearly discernible pattern of action involving Cutter and his salesmen is traceable from the face of this record." 235 F. 2d at 545.

And in *Scheve* v. *United States,* 184 F. 2d 695 (C.A. D.C.), a three-count indictment charged gambling and assault offenses as follows:

Count 1—TS, JS, K, R	Keeping gaming table.
Count 2—JS	Assault with intent to kill.
Count 3—JS	Assault with dangerous weapon.

The Court of Appeals for the District of Columbia found no error in a denial of severance under circum-

stances where the assault, made upon the person of one losing at the gaming tables, grew out of an altercation arising because of a demand for return of losses by the victim's wife. The court found that the gambling and the assault were a "series of acts or transactions" under Rule 8(b), "in which series, if not in each of its members, all four defendants participated." It noted that there was such close connection as to time, place, and occasion that it would have been difficult, if not impossible, to separate proof of one charge from the proof of the other.

In *Ross* v. *United States*, 197 F. 2d 660 (C.A. 6), certiorari denied, 344 U.S. 832, the Court of Appeals for the Sixth Circuit found no error in the denial of a motion to elect, filed by two defendants who were tried jointly with another defendant for making false statements in loan transactions under an indictment including certain substantive counts upon which the two defendants had been acquitted previously and the third was still charged. The court noted that there was a "close relationship" among the transactions in the several counts.

See also *United States* v. *Antonelli Fireworks Co., Inc.*, 155 F. 2d 631 (C.A. 2), certiorari denied, 329 U.S. 742; *Vaughn* v. *United States*, decided October 27, 1959 (C.A. 5), certiorari denied, February 23, 1960 (No. 624, this Term); *Griffin* v. *United States*, 272 F. 2d 801 (C.A. 5); *Kivette* v. *United States*, 230 F. 2d 749 (C.A. 5), certiorari denied, 355 U.S. 935; *United States* v. *H. J. K. Theatre Corp.*, 236 F. 2d 502 (C.A. 2), certiorari denied, 352 U.S. 969.

The petitioners' reliance upon the case of *McElroy* v. *United States*, decided before the adoption of the Federal Rules of Criminal Procedure and before the passage of the harmless error statute,* is misplaced. As noted above, p. 27, the offenses there charged—two of arson of two different dwellings and two of assault with intent to kill two different persons—were totally unrelated. It was for this reason that *McElroy* was distinguished in the vast majority of cases involving the joinder of defendants arising before the adoption of the Rules. See, *e.g.*, *United States* v. *Tuffanelli*, *supra*; *United States* v. *Smith*, *supra*; *Morris* v. *United States*, 12 F. 2d 727 (C.A. 9); cf. *Castellini* v. *United States*, 64 F. 2d 636 (C.A. 6). For the same reason *McElroy* has since been distinguished in practically all the cases arising since the adoption of the Rules. See *United States* v. *Rosenfeld*, *supra*; *Scheve* v. *United States*, *supra*; *Ross* v. *United States*, *supra*.

The case of *Kotteakos* v. *United States*, 328 U.S. 750, also relied upon by petitioners, is likewise inapposite. As the court below noted, in addition to the distinguishing factor that that case involved a large number of defendants tried jointly, there was the problem of variance brought about because the indictment charged, and the court gave instructions pertinent to, one huge conspiracy, while the evidence developed that there were in fact some eight separate conspiracies. The result in *Kotteakos* might well have been different had the indictment charged eight

* Sec. 269 of the Judicial Code, as amended (28 U.S.C. (1946 ed.) 391), Act of February 26, 1919, c. 48, 40 Stat. 1181.

closely related conspiracies, connected by the participation of the central figure, and had the evidence been developed, and the jury adequately instructed, in such manner as to protect each individual defendant against the danger of being held responsible for acts of the others. In any event, we have no such problem in the instant case. Here the conspiracy count failed, but the three properly-joined substantive counts, meeting the requirement of Rule 8(b), went to the jury with proper instructions. There was no danger of the *en masse* treatment condemned by *Kotteakos*.

In this case there were three defendants (treating the Schaffers, who acted together, as one), each separately charged. Each defendant was a part, even though separate, of a scheme which had a common center—the operations of the Stracuzzas to deal in stolen merchandise. The central facts of the scheme were the same as to each, and had to be proved in each case. The separate question as to each was his own intent, a matter easily separated out of the general scheme. As we understand the purpose of the Advisory Committee, this is the kind of situation in which it was intended to permit joinder under Rule 8(b) even though the defendants would be separately charged.

B. THERE WAS NO PREJUDICE RESULTING FROM THE JOINDER

1. *Reversal may be predicated only on a finding of prejudice.*

Although we believe that the substantive counts standing alone were properly joined, even if this were

not so, the petitioners would not, in the absence of a showing of prejudice, be entitled to reversal. Given proper joinder at the outset of trial—which the petitioners concede, by virtue of the conspiracy count—misjoinder arising because of the failure of the conspiracy count at the time of the submission of the case to the jury would be ground for reversal only if the petitioners had been prejudiced thereby. This is what the court below correctly held.

Prejudice is the only guidepost for the court in determining the right to relief for misjoinder arising during trial. In the earliest federal case supporting the propriety of joinder of different felonies under proper safeguards, *Pointer* v. *United States, supra,* 151 U.S. 396, this Court said at p. 403:

> The court is invested with such discretion as enables it to do justice between the government and the accused. If it be discovered at any time during a trial that the substantial rights of the accused may be prejudiced by a submission to the same jury of more than one distinct charge of felony among two or more of the same class, the court, according to the established principles of criminal law, can compel an election by the prosecutor. * * * [T]hat section [Rev. Stat. Sec. 1024] is consistent with the settled rule that the court, in its discretion, may compel an election when it appears from the indictment, or from the evidence, that the prisoner may be embarassed in his defence, if that course be not pursued.

See also *Pierce* v. *United States,* 160 U.S. 355; *United States* v. *Ball,* 163 U.S. 662, 673; *Stilson* v. *United States,* 250 U.S. 583.

The principle there announced has been the guiding consideration for courts which have since been called upon to decide questions of alleged abuse of discretion in denying relief from misjoinder. *Dunaway* v. *United States*, 205 F. 2d 23 (C.A.D.C.); *Morris* v. *United States*, 128 F. 2d 912 (C.A. 5); *United States* v. *Perlstein*, 120 F. 2d 276, 281 (C.A. 3); *United States* v. *Lotsch*, 102 F. 2d 35, 36 (C.A. 2), certiorari denied, 307 U.S. 622. It is incorporated in Rule 14 of the Federal Rules of Criminal Procedure which authorizes the court to exercise its discretion to grant relief from misjoinder "[I]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together * * *." *Supra*, p. 3.

Even where one conspiracy has been charged, and several proved, this Court has held that reversal is not automatically required, but that the issue must be considered in relation to the whole trial. *Berger* v. *United States*, 295 U.S. 78, a decision which this Court in *Kotteakos* v. *United States*, 328 U.S. 750, did not overrule, but merely held inapplicable to the different facts presented in *Kotteakos*. See also *United States* v. *Liss*, 137 F. 2d 995 (C.A. 2), certiorari denied, 320 U.S. 773; *United States* v. *Rosenberg*, 150 F. 2d 788, 793 (C.A. 2), certiorari denied, 326 U.S. 752. This is so even though, where one conspiracy count is submitted to the jury, there is necessarily a charge that the acts of one defendant are held attributable to all. Where, as here, the conspiracy count is not submitted to the jury, and the jury is explicitly instructed that guilt must be found only on the evidence relating to a

particular defendant, it is clear that reversal for misjoinder must depend on a finding of prejudice.

The government does not, as the petitioners seem to think (No. 111, Pet. Br. 26), argue that the district court was wrong in finding that one general conspiracy was not proved. All that we say is that, on this record, there is no basis for any implication that the conspiracy count was included merely to make possible what would have otherwise been an improper joinder. In the first place, as discussed above, we think the joinder was proper whether or not there was a conspiracy count. And even if that were not so, the belief that all defendants were members of a single conspiracy, although not established at the trial, was not so wholly unreasonable as to justify an implication of bad faith. There is no doubt that the Stracuzzas themselves were in one general conspiracy to deal in stolen goods. There is also no doubt that conspirators can be held liable as members of a single conspiracy, even though they serve different functions in the conspiracy and do not know each other. *Blumenthal* v. *United States*, 332 U.S. 539. And so, as to some illegal enterprises, such as narcotics rings, it has been held that different buyers from the same source are sufficiently dependent on the operation of an illegal ring that they may be joined as conspirators even though they did not know each other and were not in any direct relationship. *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863. The district court found that such was not the situation here; that none of the petitioners had a sufficient stake in the whole venture to justify finding them a

part of the whole general conspiracy. But the lines are difficult to draw and a prosecutor cannot be accused of bad faith because he thought this case fell within the "ring" rather than the *Kotteakos* rationale.

The sole question which this case presents on this point, therefore, is whether on this record the joinder of the separate substantive offenses prejudiced petitioners.

2. *The rights of the petitioners were fully protected*

A review of the record reveals that the petitioners could not have been prejudiced by the joinder at the trial. The evidence was developed in orderly fashion, and was easily followed. In the testimony of "Tony" Stracuzza, the "fence" and the one witness common to all of the petitioners, great care was taken to describe the transactions which he had with each retailer separately and in turn (see R. 46–78). As to the other witnesses (with one minor exception), they were called systematically in groups that focused attention on each particular defendant, first against Max Schaffer, then Norman Schaffer, then Benjamin Marco and finally Hyman Karp (See Tr. 879–990, 991–1107, 1108–1205). As the court below noted, with virtually every offer of proof, testimony or exhibit, an instruction was requested and obtained that proof admitted with respect to one defendant was not to be considered with respect to any other defendant.[7] Neither was this danger at all likely, since the proof

[7] See *e.g.* Tr. 384, 440, 454, 882, 899, 911, 960–961, 993, 1012, 1037–1038, 1054, 1109, 1123, 1133, 1148. The Court of Appeals notes that over fifty such requests and instructions were given (R. 113).

against one defendant in no way implicated another. The main issue—crystallized by the petitioners' defenses—was a simple one, *i.e.*, whether they had knowledge of the stolen character of the goods. The evidence developed to show this guilty knowledge was peculiar to the particular defendant with which it was concerned. Thus the motion picture showing Max Schaffer in the Stracuzza showroom could not have incriminated the other petitioners. This is likewise true with respect to the testimony of Mr. Marco's employees concerning the removal of labels from garments, the testimony that Mr. Karp telephoned Mr. Stracuzza about protection, and the testimony regarding admissions or statements made by the separate defendants. As to the question of whether one of the petitioners could have been prejudiced by imputing to him the *mens rea* of the others, the comment of Judge Learned Hand in *United States* v. *Liss*, *supra*, 137 F. 2d at 999, is pertinent: "* * * if we are to clutch at such shadows, the criminal prosecution of complicated crime becomes impossible, and the phantom of the innocent man convicted will prevent any effective enforcement of the law."

The joint trial of the defendants did not keep any one of them from putting in any defense he might have had. The remarks of the trial judge that the defendants could put in their case at their peril (see No. 111, Pet. Br. 33) were, as we read the record, made with respect to the court's ruling on the "aggregate value" question, that further proof on that issue would be perilous. But even if this was intended more generally, this is not different from the situation in which

any defendant finds himself when his motion for judgment of acquittal is denied. He must decide whether to rest on what he deems the failure of the government's proof or put on a case with the possibility that his defense may actually bolster the government's case. Since the trial judge had dismissed the conspiracy counts before the defendants were to put on their case, they could not have been under any impression that evidence offered as to one would be allowed to be imputed to the others.

The court's charge to the jury (characterized by one defense counsel as extremely fair, R. 62a) not only reviewed the evidence separately as to each defendant, but admonished that the jury was required to consider the evidence against each defendant separately and as it related to him under the particular count under which he was charged (R. 50a). Naming each defendant separately and in order, the court reviewed the proof which the government relied upon to show guilty knowledge, and in turn recapitulated each separate argument relied upon by each defendant to refute such knowledge (R. 55a–58a). It is true, as the petitioners state (No. 111, Pet. Br. p. 34), that at one point the judge treated together evidence "as against all the defendants." But this was simply because the same evidence, as to how the Stracuzzas operated, had to be shown as to all the defendants and was admissible against all the defendants. The fact that the judge specifically said that this evidence applied against all the defendants, whereas other evidence did not, shows how very careful he was to make the issues clear. Under the circum-

stances in which the evidence was developed, the jury could not have been confused.

There is no reason for speculating that the jury might have, in disregard of cautionary instructions, found guilt as to one defendant on the basis of evidence applicable to another. See *Delli Paoli* v. *United States*, 352 U.S. 232; *Opper* v. *United States*, 348 U.S. 84; *Blumenthal* v. *United States*, 332 U.S. 539. As this Court said in *Delli Paoli* v. *United States*, *supra*, 352 U.S. at 242:

> To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial. * * *

II

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT UNDER THE STATUTE IT COULD ADD TOGETHER THE VALUE OF ALL SHIPMENTS ALLEGED IN EACH COUNT IN DETERMINING WHETHER THE JURISDICTIONAL AMOUNT WAS REACHED

As to each petitioner, the indictment alleged in a single count that for a period of several months he and the Stracuzzas transported and caused the transportation of merchandise known to have been stolen. It was never at any time suggested that any single count was duplicitous as covering several distinct offenses. It was stipulated that the total of the mer-

chandise, shipped to each petitioner during the period charged in that single count, was over $5,000, even though each individual shipment was less. The trial court charged the jury that they could rely on the stipulations that the total shipped in the period charged in each count was over $5,000 (R. 58a).

It is the government's view that the charge of the trial court was correct under the statute. In brief, our position is that, if more than one shipment can properly form the basis of a single count, *ipso facto*, they have sufficient unity of purpose to justify aggregation under the statute. Whatever may be the situation where shipments charged in separate counts must be totaled to form the necessary $5,000, it seems that it was the intent of Congress that, where shipments have enough of a relationship so that they can be properly charged as a single offense, there is a violation of the federal statute. The court, therefore, properly rejected petitioners' request to charge that the jury had to find beyond a reasonable doubt that the shipments were transported pursuant to a single plan or agreement.

A. THE LANGUAGE

Section 2314 of Title 18 U.S.C. (62 Stat. 806, as amended by 63 Stat. 96) (pp. 2–3, *supra*) provides a penalty for transporting

> * * * in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen * * *.

The term "value" is defined in Section 2311 in pertinent part:

> "Value" means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a *single indictment* shall constitute the value thereof. [Emphasis added.]

The statute states that when any shipments of goods, etc. are so related as to be properly charged against a shipper in the same *indictment,* whether in the same or separate counts, it is the total value of such shipments which determines whether the shipper is subject to prosecution under the statute. The literal language of the statute goes far beyond the position necessary to sustain the trial judge's charge here. Under the literal language, if offenses may properly be joined in one indictment, the totality of shipments represented by such offenses may be aggregated to make up the $5,000. Considering the present liberality of rules for joinder, such a literal reading of the statute would go very far. The trial judge believed there could be serious doubt of the application of the literal language if, in this case, there had been any attempt to lump together the shipments made to the different defendants. That problem is not here. There seems no doubt that a sufficient relationship to meet the requirements of the statute is established by the very fact that the transaction is covered in a single count, and no claim is made that such count is duplicitous.

That Congress contemplated, at the very most, a loose relationship in order to justify aggregation, and that it did not require a "single plan or agreement" is shown by the legislative history of these code provisions which had their genesis in the National Stolen Property Act of 1934 (48 Stat. 794, 18 U.S.C. (1940 ed.) 413–419). Section 3 of that Act provided punishment for transporting or causing

> * * * to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen * * *, knowing the same to have been so stolen * * *.

And Section 5 of the Act provided:

> In the event that a defendant is charged in the same indictment with *two or more violations* of this Act, then the aggregate value of all goods, wares, and merchandise, securities, and money referred to in such indictment shall constitute the value thereof for the purposes of sections 3 and 4 hereof. [Emphasis added.]

"Two or more violations" is not language which connotes a single plan or conspiracy.

The Congressional purpose in setting the $5,000 minimum is stated in House Report No. 1462, 73d Cong., 2d Sess. (1934), p. 2, which accompanied S. 2845:

> * * * There is added a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more.

> It is believed that it would place too great a burden on the Department of Justice to ask it to undertake to apprehend and prosecute every person violating the substantive provisions of such a law without regard to the amount of property involved. The minimum valuations fixed in the bill required to give the Federal Government jurisdiction are the figures asked and recommended by the Attorney General.

The same report states:

> As reported by your committee, the jurisdiction of the federal government is limited to cases in which the value of the stolen property is $5,000 or more * * *. *There is added a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more.* [Emphasis added.]

Conference Report No. 1559, 73d Cong., 2d Sess. (1934), p. 3, contains a like expression:

> The second amendment of the House added, also, a provision which authorizes Federal jurisdiction in the case of a series of transactions involving property of a total value of $5,000 or more. The Senate agreed to the amendment.

In 1939, the statute was broadened to include embezzled property. House Report No. 422, 76th Cong., 1st Sess., pp. 1–2, made the following comment as to the value requirement:

> It is to be noted, in this connection, that under the terms of section 5 of the act in the event the defendant is charged with a series of

violations, the aggregate value of the property referred to in the indictment may be taken to make up the minimum valuation.

The purpose of this part of the statute is evident. Congress did not wish the Department of Justice to be burdened with numerous small violations. But Congress also wanted to make certain that a violator would not be able to be free of federal control by taking advantage of the $5,000 minimum as to shipment. We think that the use of the word "series" is significant. A "series" is not the same as a "single plan or agreement." Acts may be in series even though they are disconnected. It was the evident thought of Congress that a habitual offender should be subject to federal jurisdiction and that, if acts had a sufficient relationship to warrant joinder of offenses in one indictment, that was enough of a connection to justify aggregation of the amounts so as to meet the minimum required for federal jurisdiction. It may be that, where a number of different counts are charged against an individual, a jury ought to be told that it must find the counts sufficiently related to constitute a series of acts before it can aggregate.[8] Or it may be that, to render the literal language inapplicable, a defendant would have to move to have counts dropped for misjoinder on the ground that the offenses joined in one indictment were too unrelated to warrant joinder.

[8] We see no basis for requiring a finding of a single plan or agreement as suggested in *Andrews* v. *United States*, 103 F. 2d 511, 514 (C.A. 4), even if, as that decision suggests, totally unconnected shipments cannot be aggregated. Between total disconnection and a "single plan or agreement" there could be many factual patterns which would amount to a "series" of transactions.

Whatever problems that situation may present, this case does not raise.

Here, all shipments of a particular defendant were charged in one count. No claim was made or could be made that the count is duplicitous. The language of each count contemplated proof of continuous shipments made by each petitioner—shipments of the same kind of goods having the same origin and destination, taking place during a period of some two and a half months, and having a total value in excess of $5,000. The propriety of charging this series of shipments in one count was shown by the proof that the shipments were made according to a pre-arranged agreement between the Stracuzzas and each of the petitioners—which contemplated continuous shipments, at specified discounts, of specified types of goods.* But the legal propriety of each count in charging transactions covering a span of time is not a jury issue and the judge properly refused to refer it to the jury. Both the language of the statute and its legislative history support the theory on which the case went to the jury—that shipments charged in a single count may be aggregated for the purposes of federal jurisdiction.

Since we assert that the basis of decision adopted by the trial court was correct, it is not necessary to meet the petitioners' argument that the court below upheld the conviction on the basis of findings of

* We read the reference to this fact in the opinion below as merely spelling out that closeness of relationship that, without question, gave the shipments unity for purposes of the statute. Its opinion represents no improper fact-finding (Pet. Br. No. 111, p. 35) or departure from the theory of conviction (Pet. Br. No. 111, p. 40), as alleged by petitioners.

fact which were not submitted to the jury. Cf. *Grunewald* v. *United States*, 353 U.S. 391. We urge that the findings, if such they can be called, of the Court of Appeals are unnecessary to sustain the conviction so that there is no necessity for a new trial to permit a jury to pass upon factual issues which are not necessary to the decision.

III

THE PROSECUTOR'S SUMMATION WAS PROPER

Petitioners Karp and Marco urge that comments of the Assistant United States Attorney in summation, admittedly invited by the argument of defense counsel, were so improper as to deprive them of a fair trial (see the Statement *supra*, pp. 12–15). A reading of the arguments to the jury, however, show that the remarks complained of constituted a legitimate response to defense counsel's charges.

1. These petitioners argue (Pet. Br. No. 122, p. 15) that government counsel by his comments was "tendering" to the jury the false issue of his own integrity, as a substitute for the real issue of the defendants' guilt. This is precisely what the remarks of government counsel did *not* do. It was defense counsel who attempted to raise the issue of the integrity of the prosecutor by implicitly suggesting that he had made a deal with the government's main witness to testify in return for favored treatment for himself, his wife, Dorothy, and his brother Marie—a deal which allegedly contemplated that the wife and brother not be called to testify. Government counsel scrupulously avoided personal protestations of his innocence of un-

ethical conduct which might becloud the only issue with which the jury was concerned—that of innocence or guilt of the defendants. His reply was a brief statement that his job was not to convict, that the government wins when justice is done, and that if the jury believed that the government had concealed the true facts, it had the duty to acquit. The court below properly characterized the reply as demonstrating "a commendable candor and sense of fair play."

In this respect the conduct of the Assistant United States Attorney was different from that of the prosecutor in the case of *United States* v. *Spangelet*, 258 F. 2d 338 (C.A. 2), who, provoked by a similar argument made by defense counsel, replied, 258 F. 2d at 342: "I have been in this office for two and a half years and I am going to leave shortly. I have never made a deal with anybody." And we think it significant that the same court in *United States* v. *Stromberg*, 268 F. 2d 256 (C.A. 2), certiorari denied, 361 U.S. 863, distinguished *Spangelet*, finding that government counsel was well within his rights in stating that he would never engage in unfair tactics, in reply to the argument of defense counsel that two government employees had framed the defendants, that the United States Attorney had no choice but to prosecute the defendants, and that he himself did not believe the witness.

Moreover, the remarks of the Assistant United States Attorney here were of a general nature, expressing no personal opinions. The petitioners have no ground to claim that he was bolstering, by his personal prestige, the credibility of the testimony under

attack. This was the claim made in *Lawn* v. *United States,* 355 U.S. 339, where government counsel vouched for certain witnesses "because we think they are telling the truth". Even in this situation this Court rejected the claim, noting that the court's charge had instructed careful scrutiny of the testimony of the witnesses (as in the instant case, R. 60a), and that the prosecutor's remarks had been prompted by defense counsel's argument among other things that the United States Attorney and his assistant had been "instructed" in a case "instituted in bad faith." The court said at 355 U.S. 359–360, fn. 15, "These comments clearly invited the reply which petitioner Lawn now attacks. Cf. *Gridley* v. *United States,* 44 F. 2d 716, 739; *United States* v. *Battiato,* 204 F. 2d 717." For other instances of comparable "invitations", see *Christensen* v. *United States,* 16 F. 2d 29 (C.A. 9); *Malone* v. *United States,* 94 F. 2d 281 (C.A. 7), certiorari denied, 304 U.S. 562; *Hagans* v. *United States,* 261 F. 2d 924 (C.A. 5), certiorari denied, 359 U.S. 967; *United States* v. *Stromberg, supra.*

The petitioners likewise have no basis for complaining that the remarks in any way constituted unsworn testimony as to guilt. This type of claim was made in *Henderson* v. *United States,* 218 F. 2d 14, 19, 21 (C.A. 6), certiorari denied, 349 U.S. 920, where the prosecutor made unprovoked, strong remarks indicating his belief that the defendant was guilty and that if "I don't believe he is guilty no one is going to make me stand here and prosecute him * * *." Here again it was held that it was not misconduct on the part of the prosecutor to express his individual belief

that the accused was guilty if it was based solely on the evidence introduced and the jury was not led to believe there was other evidence known only to the prosecutor.

2. The petitioners also contend that the Assistant United States Attorney improperly represented that Mario Stracuzza had nothing to contribute to the evidence that would not be cumulative of the testimony of Anthony Stracuzza (Pet. Br. No. 122, p. 12). This would be a valid argument if government counsel professed to speak of his own personal knowledge so as to be in effect testifying without being sworn. See *Lawn* v. *United States, supra; United States* v. *Tucker,* 267 F. 2d 212 (C.A. 3) (discussed in petitioner's brief (No. 122) at pp. 19–20). But here government counsel was not professing to speak of his own personal knowledge as to facts not of record. He specifically referred to the sworn testimony of an F.B.I. agent that both Stracuzzas gave a joint story, and it was upon this testimony, offered in the regular course of the trial, that his statement was properly based.

3. Nothing about the remarks complained of emerges as improper. The federal cases upon which petitioners rely are inapposite. In *Berger* v. *United States,* 295 U.S. 78, and *Pierce* v. *United States,* 86 F. 2d 949 (C.A. 6), the circumstances complained of were unprovoked, pronounced and persistent misconduct having a cumulative effect, including misstated and assumed prejudicial facts, and insinuations of prior complicity in wrongdoing or crime on the part of the defendants. As noted above, *United States* v.

Spangelet, 258 F. 2d 338, condemned statements which amounted to unsworn testimony. See also *People* v. *Lovello,* 1 N.Y. 2d 436, 154 N.Y.S. 2d 8, 136 N.E. 2d 483. This is likewise true of *United States* v. *Tucker,* 267 F. 2d 212, 214 (C.A. 3), where the court characterized representations as to the magnitude of criminal activity not charged as "the plainest misuse of final argument to introduce prejudicial new evidence from the lips of the prosecutor himself, though he was not under oath and not subject to cross-examination." *Nalls* v. *United States,* 240 F. 2d 707 (C.A. 5), and *Snipes* v. *United States,* 230 F. 2d 165 (C.A. 6), involved unprovoked, volunteered statements that the government had other witnesses it was not using because their testimony would merely be corroborative, and that the government could have charged the defendant with 30 or 40 counts in an indictment.

The record here justifies the conclusion that defense counsel was employing the tactics of which he has accused the government. Thus, even now, the greater portion of the brief in No. 122 is devoted to justifying his own advocacy by reliance on facts not a part of the record, and renewing arguments that a deal had been reached and the petitioners' defenses thwarted. (see Brief, pp. 9, 13). The remarks of Mr. Justice Frankfurter dissenting in *In re Sawyer,* 360 U.S. 622, 667, are applicable here:

> To be sure, a prosecutor carries a somewhat heavier responsibility in the maintenance of the standards of criminal justice than does counsel for the defense. But the difference in responsibility is surely not so vast that counsel for

defense has a constitutionally guarded freedom to conduct himself as this petitioner has been found to do, when that same conduct would bring condign punishment for the prosecutor.

CONCLUSION

It is respectfully submitted that the judgments below should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1959.

No. 111.

MAX SCHAFFER and NORMAN SCHAFFER,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETITIONERS' REPLY BRIEF.

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UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' REPLY BRIEF.

"The Government continues riding a legal pogo-stick in this case. Only a few days before argument in this Court, in a move that can only be described as an attempt to win a case at any cost, the Government unabashedly repudiated the entire decision of the Court of Appeals. Although that court adopted in toto the arguments made there by the Government, we now are informed by the Government that the lower court was "in error" (Gov't Br. 32). There is at least this consistency to the Government's stance: in the Court of Appeals the Government abandoned the theory of the case which the District Court had taken at the Government's behest. The Government deserves credit for being agile, if not fair.

The Government has come forth with what it advertises as two entirely new theories to sustain the convictions in this case. No explanation is offered for their sudden appearance for the first time in the Supreme Court of the United States. Examination of these new arguments, as we shall see, reveals that they are simply facades to cover over the decision of the Court of Appeals which the Government declines openly to defend.

I.

The first question presented by the petition for certiorari challenged the validity of the joint trial of three defendants,[1] charged with independent and unrelated offenses. In the courts below this mass trial was upheld solely on the ground that the indictment had also contained a conspiracy count bracketing all of the defendants. The Court of Appeals said:

> "Were it not for the conspiracy count, it would have been clearly erroneous to try appellants together under Rule 8(b), Fed. R. Crim. P." (R. 112)

This conspiracy charge was so flimsy, so completely without support in evidence, that the trial court, essentially on its own motion, dismissed the charge after the prosecution had presented its case. Petitioners presented to this Court the question whether such a flimsy and fictional conspiracy allegation could justify their mass trial.

A. The Government has now abandoned the legal position it urged upon the lower courts. Not one paragraph in its brief is devoted to it. The Court of Appeals, we are told, was "in error": the conspiracy count is not an "indispensable nexus" to a mass trial in this case and "has no bearing" on the issue (Gov't Br. 16, 21, 32). The Government thus casually attempts to dismiss from further consideration the primary question which this Court agreed to

1. To simplify the discussion, the two Schaffers are treated as one defendant.

hear. Its refusal to meet the question can only be explained as an admission that the conspiracy allegation cannot be defended as a basis for conducting a mass trial.[2]

B. In place of the abandoned conspiracy theory of joinder, the Government has come up with a brand new argument. Briefly, the Government now contends that, even if there had been no conspiracy charge, the defendants nonetheless would have been properly subjected to a mass trial. The Government does not even attempt to explain why this new theory was not raised or recognized in either court below.

The argument centers, as it must, upon Rule 8(b) of the Federal Rules of Criminal Procedure. This permits joinder of defendants who participated in "the *same* act or transaction or the *same* series of acts or transactions." It is quite obvious that each of the defendants in this case participated in a series of transactions. These series of transactions were *similar*, but they were not the same. Each defendant, separately and without any connection with

2. In *Grunewald v. United States*, 353 U. S. 391, 404, Mr. Justice Harlan wrote: "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." A recent decision of the British Criminal Court of Appeal, *Regina v. Dawson*, C. C. A. (1960), 1 W. L. R. 163, strongly underscores this attitude:

> "With regard to the first count, for conspiracy, we feel that it is desirable to say something more. This court has more than once warned of the dangers of conspiracy counts, especially these long conspiracy counts, which one counsel referred to as a marathon conspiracy count. Several reasons have been given. First of all, if there are substantive charges which can be proved, it is in general undesirable to complicate and to lengthen matters by adding a charge of conspiracy. Secondly, it can work injustice because it means that evidence which otherwise would be inadmissible on the substantive charges against certain people becomes admissible. Thirdly, it adds to the length and complexity of the case so that the trial may easily be wellnigh unworkable, and impose a quite intolerable strain both on the court and on the jury."

the other defendants, purchased goods from the Stracuzzas. There were three separate series of transactions. Clearly this would not permit a joinder of the defendants.

The Government is aware of this, although its brief does not always keep the distinction sharply in focus. To say that each of the defendants participated in a series of transactions is true enough. To say that the participants in a series of transactions can be joined under Rule 8(b) is also true enough. These two propositions, artfully combined, may create the illusion that joinder was proper in this case. The real question, however, is whether *all* of the defendants participated in the *same* series of transactions. Only in this circumstance would joinder be proper.

Carefully read, the Government's brief does face up to this requirement. Every one of the cases cited by the Government to show proper joinder in "analogous circumstances" (Gov't Br. 34-35) involved defendants[3] who had in fact participated in the same series of acts or transac-

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3. In *United States v. Rosenfeld*, 235 F. 2d 544 (C. A. 7), certiorari denied, 352 U. S. 928, graphically cited by the Government as a case authorizing joinder in circumstances "analogous" the Government in its brief in opposition (Oct. T. 1956, No. 488) at pages 9 and 10 there stated:

> "Here the indictment and the trial record clearly indicate that the offenses and the defendants were linked in a logical series of interrelated transactions which could properly be joined under the rule. Thus, both transactions involved salesmen of the Consolidated Home Improvement Company of Evansville, Indiana; both involved a strikingly parallel pattern of conduct *i.e.*, the 'model home' and 'bonus' technique; the overt acts charged were essentially similar; Cutler played the same role in each transaction; and evidence of past activity revealed like transactions involving Cutler and these and other salesmen. (See Statement, *supra*, pp. 4-8.)
>
> In totality, the transactions appear as related threads of a common all pervading plan. Indeed, petitioner and all the co-defendants could reasonably have been named in one general conspiracy count for the individual salesmen, '[b]y their separate agreements, if such they were, * * * became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by

tions. The Government has devoted 18 pages of its brief to a point of law which is obvious on the face of Rule 8(b). Even a brief of 180 pages with ten times as many cases would not make this basis for joinder of defendants applicable to this case.

In the teeth of the facts, however, the Government blandly asserts that all of these defendants participated in a single series of transactions. Not a word is said of the indisputable fact that the District Court dismissed the conspiracy count because there was not a shred of evidence to connect any of the defendants with the others. There is nothing in the record to show that any defendant knew of the Stracuzzas' dealings with the other defendants. *Not one citation* is given to a page in the record where one might look for evidence that all of the defendants took part in the same series of transactions.[4]

In contrast to the assertion of the Government that all of the defendants were participants in a single enterprise, there is the following description of the case in the opinion of the Court of Appeals:

> "There was only one witness common to all defendants, Tony Stracuzza, and he gave his testimony in orderly fashion describing his business and then his relationship and his transactions with each defendant

---

their common single goal.' *Blumenthal v. United States*, 332 U. S. 539, 558. That the defendants were instead charged in separate conspiracy counts could have worked only to petitioner's benefit."

The other cases cited by the Government are just as "analogous" as this one.

4. Oddly enough, in another section of the Government brief it is argued that "with virtually every offer of proof, testimony or exhibit, an instruction was requested and obtained that proof admitted with respect to one defendant was not to be considered with respect to any other defendant" (Gov't Br. 41). The Government especially stresses how easily separated was the evidence as to each defendant. This is entirely inconsistent with the situation where defendants are properly joined; there would be "relevancy or dependency of the proof" relating to defendants properly joined (Gov't Br. 17, 32).

in turn. Each defendant lived in a different part of the East, except the Schaffers who operated their store together; and *there is nothing in the record to indicate that any one of them knew of Stracuzza's dealings with the others.*" (R. 114) (Emphasis added.)

All the Government says is that the indictment *alleged* that the three defendants took part in the same series of transactions. "We think it clear that the substantive counts did *allege* a (i.e., one) series of transactions" (Gov't Br. 33) (Emphasis added).[5] The argument seems to be that if joint participation in a single enterprise is alleged, it is a matter of no consequence that there is a total failure of any evidence to support the allegation.

This brings us full circle back to the issue posed by the conspiracy theory of joinder. From petitioners' standpoint, it makes no difference what fictional allegation is employed to deprive them of their fundamental rights—whether it be a flimsy allegation of a conspiracy or an equally flimsy allegation of participation in the same series of transactions. The same question is posed in either situation: can a mass trial be made possible by use of a fiction?

If the Government chooses to stand on its new theory of joinder, however, there is no need to reach the problem of the fictional allegation as a basis for joinder. Despite the Government's assertion, it is not even arguable that the indictment in this case (R. 5a-7a) charges in the substantive counts that all of the defendants participated in the same series of transactions. Each count is complete and integrated in itself. There are no cross references. The acts described in each count are manifestly different from the acts in the other counts. While it is true that the Stra-

5. Similar assertions are found on page 17 of the Government Brief. The Government also states: "Each defendant was a part, even though separate, of a scheme which had a common center . . ." (Gov't Br. 37). This assertion, which purports to describe proved facts rather than the allegations in the indictment, is entirely lacking in support in the record. The Government, of course, cites nothing to substantiate it.

cuzzas are named as co-defendants in each of the substantive counts, that is more consistent with three unrelated series of transactions than it is with one single series. If the presence of one co-defendant in each of three otherwise unrelated indictments is enough to constitute an allegation that all the indictments charge a single transaction, then words have lost all meaning.

Under the conspiracy theory of joinder, there was *at least an allegation* that the defendants *participated* in a common enterprise. Its fundamental weakness was the lack of any evidence to support the charge. The Government's new theory, equally lacking in any basis in fact, does not even have the dubious merit of resting upon any allegation at all. Neither theory justifies the mass trial of three separate and unrelated defendants.

In *Stirone v. United States*, 361 U. S. 212, decided by this Court on January 11, 1960, appears the following significant passage: "The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." The Government is now trying, in effect, to add something to the indictment which does not appear there now. Only the grand jury, which is a part of the judiciary, not the Government, which is a part of the executive department, can add anything to an indictment.

C. The Government continues to assert that, even if the defendants were not properly joined, they would not be entitled to reversal in the absence of a showing of prejudice. The Government failed, however, to call the attention of this Court to a recent decision of the Fourth Circuit which is directly contrary to its argument.

In *Ingram v. United States*, 272 F. 2d 567, the Government made the same argument it is now presenting to this Court. Chief Judge Sobeloff, former Solicitor General, spoke for the Fourth Circuit in categorically rejecting the Government contention. Fed. R. Crim. P. 14, which requires

a showing of specific prejudice to justify a severance or separate trials, was held to apply only to cases where joinder is proper under Rule 8. If joinder is not proper under Rule 8, relief is not conditional upon proof of prejudice.

> "In other words, where multiple defendants are charged with offenses in no way connected, and are tried together, they are prejudiced by that very fact, and the trial judge has no discretion to deny relief." *Id.* at 570.

The factual situation in *Ingram* is strikingly similar to the instant case. On the face of the indictments, there was a basis for joinder. When the evidence was received, however, the lack of connection between the offenses and the defendants was apparent. The Fourth Circuit held that it was error not to grant a new trial.

This decision is highly relevant to the instant case in several ways. As already said, it *squarely contradicts* the argument by the Government that petitioners are entitled to relief only if specific prejudice be demonstrated.[6] It is also inconsistent with the Government's argument that propriety of joinder is determined solely on the allegations in the indictment, without regard to whether any evidence supports the allegation. As in this case, there was no evidence in *Ingram* to support the allegations on which joinder rested. The Fourth Circuit held that relief must be granted.[7]

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6. Petitioners, in arguing that specific prejudice need not be shown, do not withdraw their contention that this record is replete with evidence of actual prejudice. See the main brief at pages 23 to 35.

7. It is difficult and truly disturbing to understand why petitioners must call to the attention of the Solicitor General a case so obviously important to the case now before the Court. The Fourth Circuit decision had not been published when petitioners filed their main brief. But the *Ingram* decision has been known to the Government, a party to that case, since November 5, 1959, when it was decided. While the opinion was not published until February 1, 1960, the Government brief cited, on another issue, a case published a week later. *Griffin v. United States*, 272 F. 2d 801.

D. The Government has grossly misstated the procedural setting in which the issue of improper joinder arises. It is stated flatly, and in italics, that petitioners sought a judgment of acquittal, "a judgment that they go free, not that each have a new trial separately" (Gov't Br. 22). There is nothing in the record to support that statement. It is obviously erroneous.

At the close of the prosecution evidence, the District Court heard argument of counsel. Direction of the hearing was assumed by the trial judge, who expressed special concern with the conspiracy counts (R. 11a). After hearing the Government's counsel, the Court said: "Well, I assume that all defendants move to dismiss all of the various counts in both indictments, at least for their first motion" (R. 11a), and proceeded to grant the motion with respect to both conspiracy counts.

When the discussion turned to the issue of a mass trial, the same informal procedure continued. No specific motion was made. Certainly no request was made for a judgment of acquittal on the ground of improper joinder. Counsel for the defendants argued that the defendants were seriously prejudiced by the joint trial. Counsel cited the *Cannella* case, *Canella v. United States*, 157 F. 2d 470 (C. A. 9, 1946), in which the relief of a new trial was sought. The District Court indicated that it was familiar with the case, but that it believed no relief was warranted other than cautionary instructions to the jury. Moreover, the Court of Appeals considered this very question on its merit.

At all subsequent stages, petitioners have sought only to receive a fair trial as the appropriate relief from the mass trial to which they have been subjected. The closing paragraph in the Schaffers' brief in the Court of Appeals said:

"Consequently even if the indictment is not dismissed for failure of proof of value, as we believe it should be, there must be a new trial because of the prejudice to the appellants Schaffer in being put on

trial together with two individuals with whom they were not shown to have any connection." (Brief 19)

In the petition for rehearing by the Schaffers, it was reiterated that the relief sought for improper joinder was "separate trials" (Pet. 10). In the Petition for Certiorari, we said: "All that was necessary to protect petitioners was a severance of the trial when the conspiracy count was dismissed" (Pet. 12).

In sum, at no time did the defendants ever suggest that they were entitled to an acquittal, "a judgment that they go free, not that each have a new trial separately," on the ground of improper joinder. The Government's assertion that they did is clearly erroneous.

II.

Not only has the Government repudiated the Court of Appeals' theory for justifying a mass trial, it has also repudiated the second half of the Second Circuit decision on whether the jurisdictional amount was proved in this case. Transportation of stolen goods in interstate commerce is a federal crime only if the value of the goods exceeded $5,000. Congress has provided that values of several shipments may be aggregated under certain circumstances. The petition for certiorari raised the dual questions of what factual circumstances would permit such aggregation and how the necessary facts will be found in a particular case.

The Second Circuit held that aggregation would be proper if the shipments were made according to a prearranged agreement giving them unity for purpose of the statute. With this statement of the standard, petitioners have no quarrel. Petitioners disagreed with the Second Circuit, not on its interpretation of the standard, but on its application of the standard to their case. The application requires that there be a finding of facts. Fact finding is a jury function. The jury in this case had not been allowed

to consider precisely the same factual question which the Second Circuit undertook to decide. Fact finding in a criminal case by an appellate court is a manifest violation of this Court's decision in *Grunewald v. United States*, 353 U. S. 391.

The Government now urges that the findings of the Court of Appeals are "unnecessary to sustain the conviction" (Gov't Br. 51). Thus they attempt to sweep under the rug the issue of whether the Second Circuit disobeyed this Court's ruling in *Grunewald*. But what does the Government offer in place of the Court of Appeals' rationale? Exactly the same thing!.

We are told that the several shipments were made according to a "pre-arranged agreement" which contemplated "continuous shipments, at specified discounts, of specified types of goods" (Gov't Br. 50). The Court of Appeals, at the Government's urging, made precisely these findings of fact. Now, while repudiating the Court of Appeals' "findings", the Government is *trying to induce* this Court to make the same findings of fact.

The Government pretends that the fact that several shipments were properly joined in one count indicates that they had unity of purpose. Repeatedly it is stressed that the inclusion of several shipments into a single count was never attacked as duplicitous. Therefore, according to the Government, the several shipments must have been related.

The Government must acknowledge that joinder of offenses is proper, under Fed. R. Crim. P. 8(a), if they are *similar*. Shipments which are entirely separate and unrelated may nonetheless be similar. Petitioners would not for a minute claim that the shipments in this case were not similar. They would therefore be properly joined. To attack a count so joining them as duplicitous would have been a waste of time. That the shipments were similar, were properly joined, were not attacked as duplicitous, does not prove that the shipments were related or had unity of purpose, as the Government claims.

The Government's argument is a violation of the most elementary rule of logic. Because all horses are animals does not prove that all animals are horses. Because related offenses may be properly joined in one count does not prove that all offenses joined are related.[8]

The Government is not willing to take the position that any time joinder would be permitted by Rule 8 offenses may be aggregated to make up the $5,000. "Considering the present liberality of rules for joinder, such a literal reading of the statute would go very far" (Gov't Br. 46). The Government concedes that the "evident" purpose of the provision for aggregation was ". . . . to make certain that a violator would not be able to be free of federal control by taking advantage of the $5,000 minimum as to shipment" (Gov't Br. 49). Nothing could more obviously point to rejection of the view that entirely separate and unconnected shipments may be aggregated. The breaking up of a larger shipment into segments worth less than $5,000 necessarily leaves each shipment part of a general plan or scheme.

As the Government admits, ". . . . there could be many factual patterns which would amount to a 'series' of transactions" (Gov't Br. 49 n.8). The important words are "factual patterns." This is precisely what petitioners have contended throughout the trial. Whether such a factual pattern exists in this case is, obviously enough, a question of fact for the jury to determine.

The "factual pattern" which the Government purports to see in this case is ". . . . proof that the shipments were made according to a pre-arranged agreement between the Stracuzzas and each of the petitioners—which contemplated continuous shipments, at specified discounts, of speci-

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8. The Government's purported distinction between joinder of several acts in one count and joinder of several counts is really ingenuous (Gov't Br. 49). Every count must specify a complete offense. In any circumstance where the prosecution must aggregate shipments in order to show the jurisdictional amount, it will be impossible to charge the separate shipments in separate counts. The individual counts would lack the necessary $5,000 value.

fied types of goods" (Gov't Br. 50). Petitioners vehemently disagree with this characterization of the facts,[9] but the vital point is that the issue is one of fact.

At the Government's behest, petitioners were deprived of a jury trial on that issue of fact. At the Government's behest, the Court of Appeals improperly made a finding on that issue of fact. Now, this Court is urged by the Government to make exactly the same finding of fact.

That the Government has not shifted from the position it urged upon the Court of Appeals is made clear in the following extract from its brief in this Court:

> "We read the reference to this fact in the opinion below as merely spelling out that closeness of relationship that, without question, gave the shipments unity of purposes for the statute. Its opinion represents no improper fact-finding (Pet. Br. No. 111, p. 35), or departure from the theory of conviction (Pet. Br. No. 111, p. 40), as alleged by petioners" (Gov't Br. 50 n.9).

What the distinction is between "merely spelling out" and "fact-finding" does not appear from this exercise in sophistry. To say that the matter is "without question" is totally false.

* * *

The Government, for reasons which do not authoritatively appear, has unceremoniously "ditched" the decision of the Court of Appeals. The most likely inference is that the lower court's decision could not, with integrity, be defended. In place of the Court of Appeals' rationale, the Government has offered arguments which it labels as new and different. Only the labels have changed. The same defects are found below the thin veneer applied by the Government.

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9. See our main brief at page 38, n. 11. Cf. 136 A. L. R. 943.

It is respectfully submitted that it is now even mo
clear that the judgment of the lower court should be
versed.

Respectfully submitted,

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Counsel for the Petitione

IRVING W. COLEMAN,
1820 Main Street,
Northampton, Pa.,
Of Counsel.

March 1960.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 111

MAX SCHAFFER and NORMAN SCHAFFER, *Petitioners*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I.

The Court has stated that none of the defendants were prejudiced by being forced to stand trial jointly. The Court has held, accordingly, that there was nothing legally wrong in a mass trial of unrelated defendants.

The basic premise of the Court, the total absence of prejudice, is completely at odds with reason and com-

mon sense. Starting with the simple fact that unrelated defendants were forced to have their guilt or innocence simultaneously weighed by a single jury, prejudice was inevitable. The common law did guarantee an accused the right to a separate trial for the very important reason that guilt was deemed personal. Of necessity there is prejudice when four people are compelled to stand trial together.

This case has particularly egregious elements. The crimes of which the defendants were charged were similar in nature. Common to all the cases was the house of Stracuzza. Stracuzza's testimony was the principal evidence against them. The seeds of prejudice were clearly sown in this situation.

Added to this, the damaging evidence was presented to the jury as applying indiscriminately to all of the defendants. When the prosecution case was introduced, the baseless conspiracy charge still stood. Here is the greatest vice of this case. The first and most important impression upon the jury was that all the evidence condemned all the defendants. Under the conspiracy charge, it was common evidence "subject to connection." The crucial first impression in the jurors' minds lumped all the evidence and all the defendants.

It is an unmitigated fiction to suppose that the judge's charge at the end of the trial could undo the harm. On page 1436 of the transcript, the trial judge finally told the jurors that "the various exhibits and testimony that I admitted against one defendant subject to connection against the others is now admitted only against that particular defendant that the exhibit referred to, or the testimony referred to." Thus, in

one stroke, after weeks of trial, the jury was expected to retrace all the convoluted processes of the human mind and erase the "inadmissible" subtle conclusions that had been fixed there by the evidence as received. By that stage the image of the defendants had been fixed for better or worse. This image is a composite of an infinite number of sources. It is a manifest impossibility to eradicate the effects of that evidence which, as it turns out, should not have been part of the jury's image of a defendant.

In short, the Court simply cannot have meant to say that there was *no prejudice* to the defendants in this case. Prejudice is inherent in any joint trial. It is magnified and enlarged when the charges against the accused are similar and there is a common witness so important as Anthony Stracuzza. This complex is grossly aggravated when the evidence is initially presented to the jury on the premise that it all applies to each defendant. Substantial prejudice in this circumstance is inevitable.

II.

Petitioners continue to be confounded by the completely erroneous proposition that they raised the question of improper joinder of parties, after the conspiracy counts had been dismissed, solely in terms of a motion for judgment of acquittal. The Solicitor General made this assertion in his brief, to which petitioners filed an unequivocal denial. At the oral argument, Mr. John Davis mentioned this matter but did not pursue it beyond citation to the pages of the record on which the Government relied for its statement.

Despite this history, the Court has declared in its opinion that the petitioners "*relied entirely on their*

motions for acquittal" in challenging the prejudicial effect of their joinder. Adv. Op. p. 5. This is, we repeat, an utterly erroneous reading of the record in this case and has done petitioners incalculable harm.

The record of the proceedings which transpired in the trial court can be divided into several very distinct phases, only one of which is relevant to the issue now before this Court. First, the District Court essentially on his own motion, dismissed the two conspiracy charges. R. 11a-12a (Tr. 1414-1416). Next, the judge and the prosecutor had a brief exchange on the problem of aggregation of values for the substantive offense. R. 12a-13a (Tr. 1417-1418).

At that point, Mr. Steinberg, for the defendants, argued to the Court that there had been a huge mass of evidence which had been admitted subject to connection on the conspiracies, that the evidence now admissible against each defendant alone would be very hurtful to the other defendants, and that the defendants would all be deprived of a fair trial. Mr. Steinberg said that the prosecutor, in choosing to join the defendants under a flimsy conspiracy charge, took a calculated risk that a great deal of evidence would be admitted which might be prejudicial as to some of the defendants. Mr. Steinberg expressed grave doubt that this prejudice could be erased by instructions. R. 13a-14a (Tr. 1418-1421).

The whole gist of this argument to the District Court focused on the necessity for separate trials of the defendants. Before any motion was made, however, the trial judge indicated that, in his view, the prejudice could be cured by instructions. R. 14a (Tr. 1421). For all practical purposes, this closed the matter. Once the

Court had *ruled* that the situation can adequately be handled by cautionary instructions to the jury, to have made thereafter a formal motion for severance would obviously have been futile. Furthermore, objection to continuance of the trial having plainly been made, cf. Rule 51, F.R. Crim. P., counsel were not required to reargue the same point.

None of this discussion on joinder had the slightest connection with the motions for judgments of acquittal. The argument turned back again to the matter of aggregation of values of separate shipments. R. 15a-19a (Tr. 1424-1430). The trial court indicated that he was going to send the case to the jury with binding instructions on the issue of jurisdictional value of the goods involved. At the conclusion of this discussion, the Court stated that he assumed a motion to dismiss was filed as to the respective counts and that he would reserve decision. R. 19a (Tr. 1430). On the following day, Mr. Coleman formally moved for judgment of acquittal "upon the basis that the Government has failed to establish that merchandise was transported in interstate commerce, in a value equal to or in excess of the jurisdictional amount . . ., and that with knowledge that the same was stolen." R. 21a (Tr. 1446). Again the Court reserved decision.

It is impossible in this record to find that the issue of prejudicial joinder was raised to support the motions for judgment of acquittal. The misjoinder issue arose only once. Counsel urged the harm which befell each of the defendants and the trial judge indicated that he thought the prejudice could be erased by cautionary instructions. There the matter ended. Misjoinder was never presented as grounds for acquittal.

We submit, it is grossly unfair to the petitioners in these cases to penalize them for failure of trial counsel to make what would clearly have been a futile motion and one not even required by the Federal Rules of Criminal Procedure. This is precisely the effect, however, of this Court's statement that petitioners "relied entirely on their motions for acquittal." The statement in the opinion at Adv. Op. p. 5 that they "even failed to request a new trial"—a motion that has always been regarded as one made *after* the verdict—not one made during trial was not even the basis for an argument by the Government in the Court below or even considered by the Court below in its opinion.

There is a collateral consequence which will necessarily follow from this Court's use of the procedural issue to justify withholding of relief to these petitioners. It will become incumbent upon defense counsel in all future cases to challenge the propriety of joinder of defendants at the outset of any joint trial to insure protection of their clients. This virtually automatic procedure will entail a considerable added burden to the administration of the criminal law, not only in the District Courts but in the Courts of Appeals and this Court as well. Such a ramification ought to be thoroughly weighed before this decision is allowed to become settled.

III.

This Court has many times and emphatically voiced concern over the vagrant and volatile distension of the conspiracy concept. In *Grunewald* v. *United States*, 353 U.S. 391, 404, Mr. Justice Harlan said for the Court: "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to

broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not again be detailed."

Notwithstanding this Court's decision in this case opens up a new avenue of abuse, a further step in what Mr. Justice Jackson described as "the long evolution of that elastic, sprawling and pervasive offense" of conspiracy. This case, being one of first impression in this Court, now permits prosecutors to violate at will the safeguards which heretofore have been thought to protect persons accused of crime from being tried en masse. There are now no enforceable limitations whatsoever upon the unbridled discretion of prosecuting officers who can achieve an illegal joint trial by the simple device of a conspiracy charge, whether or not there is any basis for such a charge. Given the normal human desire to succeed, undoubtedly there will soon be a proliferation of cases in which the prosecution seeks to obtain the windfall of mass trials, where guilt can no longer be personal.

The only limitation which the Court has attached to this dangerous precedent is an admonition to trial judges in future similar cases. They are instructed to be "particularly sensitive" to the prejudice suffered by unrelated defendants forced to stand trial as a group. Since it is inescapable that there is very great prejudice deriving from the simple fact of the illegal joint trial, the Court's meaning of "particular sensitivity" obviously tolerates some degree of prejudice. Nothing really illuminates the standard by which the intolerable harm is to be measured. At best, the court's opinion in this regard expresses a mood.

The worst of the matter is that it is addressed to trial judges, who are not the source of the evil, rather than to prosecutors, who are. No amount of verbiage can disguise the plain fact that the problem must be met *at the time the indictment is drawn* if it is to be truly met at all. Petitioners urged the Court to accept a standard which would have compelled prosecutors, in deciding whether to include a conspiracy charge, to face the risk of having to retry the case in entirety if the conspiracy charge were a fiction. That seemed a small cost to pay for preservation of so basic a right as is at stake for the defendants. Instead the Court has chosen to rely on the trial judge's discretion, which must be exercised after the trial is over.

Even this slight limitation, however, is undermined by the actual decision of the Court. The lower courts reached their decisions in this case unaware, of course, that the Supreme Court would admonish them to be particularly sensitive to the possibilities of prejudice in this kind of case. This Court nonetheless relied upon the judgment of the lower courts on the matter of prejudicial joinder. The reliance, at one point, went to the unprecedent extent of the "clearly erroneous" standard familiar in appellate review of issues of fact. Adv. Op. p. 2. To hold, as the Court does, that the judgments are affirmed deprives the Court's admonition of any real meaning.

Even if this Court remains fixed on allowing joinder by the stratagem used in this case, subject to trial courts' discretionary severance, petitioners ought to be given a chance to have the lower courts pass upon their case in the light of the special instructions put forward by the Court in this case. This would be accomplished by remanding the case for further consideration of

whether a "particularly sensitive" reading would still warrant the same result.

For the foregoing reasons, it is respectfully submitted that the Court should grant a rehearing.

Respectfully submitted,

JACOB KOSSMAN,
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Counsel for the Petitioners.

IRVING W. COLEMAN,
1820 Main Street,
Northampton, Pa.
Of Counsel.

CERTIFICATION

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

JACOB KOSSMAN,
Counsel for Petitioners.

June 1960

SUPREME COURT OF THE UNITED STATES

Nos. 111 AND 122.—OCTOBER TERM, 1959.

Max Schaffer and Norman Schaffer, Petitioners, 111 v. United States of America. Hyman Karp and Benjamin T. Marco, Petitioners, 122 v. United States of America.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 16, 1960.]

MR. JUSTICE CLARK delivered the opinion of the Court.

Involved here are questions concerning joinder of defendants under Rule 8 (b) of the Federal Rules of Criminal Procedure,[1] and whether shipments of stolen goods in interstate commerce may be aggregated as to value in order to meet the statutory minimum of $5,000, under 18 U. S. C. § 2314.[2] The indictment charged trans-

[1] Rule 8 (b) provides:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

[2] 18 U. S. C. § 2314 provides in relevant part:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U. S. C. § 2311 provides so far as material here:

"'Value' means the face, par, or market value, whichever is the

portation in interstate commerce of goods known to have been stolen and having a value in excess of $5,000. It contained three substantive counts. Count 1 charged the two petitioners Schaffers and the three Stracuzzas (defendants below, who either pled guilty or were *nolle prossed* at trial) with transporting stolen ladies' and children's wearing apparel from New York to Pennsylvania. Count 2 charged petitioner Marco and the Stracuzzas with a similar movement of stolen goods from New York to West Virginia. Count 3 charged petitioner Karp and the Stracuzzas with like shipments from New York to Massachusetts. The fourth and final count of the indictment charged all of these parties with a conspiracy to commit the substantive offenses charged in the first three counts. The petitioners here were tried on the indictment simultaneously in a single trial. On motion of petitioners for acquittal at the close of the Government's case, the court dismissed the conspiracy count for failure of proof. This motion was denied, however, as to the substantive counts, the court finding that no prejudice would result from the joint trial. Upon submission of the substantive counts to the jury on a detailed charge each petitioner was found guilty and thereafter fined and sentenced to prison. The Court of Appeals affirmed the convictions, likewise finding that no prejudice existed by reason of the joint trial. 266 F. 2d 435. We granted certiorari. 361 U. S. 809. The allegations of the indictment having met the explicit provisions of Rule 8 (b) as to joinder of defendants, we cannot find clearly erroneous the findings of the trial court and the Court of Appeals that no prejudice resulted from the joint trial. As to the requirements of value, we hold that the shipment to a

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greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

single defendant may be aggregated. The judgments are therefore affirmed.

We first consider the question of joinder of defendants under Rule 8 (b) of the Federal Rules of Criminal Procedure. It is clear that the initial joinder of the petitioners was permissible under that Rule, which allows the joinder of defendants "in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." It cannot be denied that the petitioners were so charged in the indictment. The problem remaining is whether, after dismissal of the conspiracy count before submission of the cases to the jury, a severance should have been ordered under Rule 14 [3] of the Federal Rules of Criminal Procedure. This Rule requires a separate trial if "it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together . . . ." Under the circumstances here, we think there was no such prejudice.

It is admitted that the three Stracuzzas were the common center of the scheme to transport the stolen goods. The four petitioners here participated in some steps of the transactions in the stolen goods, although each was involved with separate interstate shipments. The separate substantive charges of the indictment employed almost identical language and alleged violations of the same criminal statute during the same period and in the same manner. This made proof of the over-all opera-

[3] Rule 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

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The worst of the matter is that it is addressed to trial judges, who are not the source of the evil, rather than to prosecutors, who are. No amount of verbiage can disguise the plain fact that the problem must be met *at the time the indictment is drawn* if it is to be truly met at all. Petitioners urged the Court to accept a standard which would have compelled prosecutors, in deciding whether to include a conspiracy charge, to face the risk of having to retry the case in entirety if the conspiracy charge were a fiction. That seemed a small cost to pay for preservation of so basic a right as is at stake for the defendants. Instead the Court has chosen to rely on the trial judge's discretion, which must be exercised after the trial is over.

Even this slight limitation, however, is undermined by the actual decision of the Court. The lower courts reached their decisions in this case unaware, of course, that the Supreme Court would admonish them to be particularly sensitive to the possibilities of prejudice in this kind of case. This Court nonetheless relied upon the judgment of the lower courts on the matter of prejudicial joinder. The reliance, at one point, went to the unprecedent extent of the "clearly erroneous" standard familiar in appellate review of issues of fact. Adv. Op. p. 2. To hold, as the Court does, that the judgments are affirmed deprives the Court's admonition of any real meaning.

Even if this Court remains fixed on allowing joinder by the stratagem used in this case, subject to trial courts' discretionary severance, petitioners ought to be given a chance to have the lower courts pass upon their case in the light of the special instructions put forward by the Court in this case. This would be accomplished by remanding the case for further consideration of

whether a "particularly sensitive" reading would still warrant the same result.

For the foregoing reasons, it is respectfully submitted that the Court should grant a rehearing.

Respectfully submitted,

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CERTIFICATION

The foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

JACOB KOSSMAN,
Counsel for Petitioners.

June 1960

SUPREME COURT OF THE UNITED STATES

Nos. 111 AND 122.—OCTOBER TERM, 1959.

Max Schaffer and Norman Schaffer, Petitioners, 111 *v.* United States of America. Hyman Karp and Benjamin T. Marco, Petitioners, 122 *v.* United States of America.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 16, 1960.]

MR. JUSTICE CLARK delivered the opinion of the Court.

Involved here are questions concerning joinder of defendants under Rule 8 (b) of the Federal Rules of Criminal Procedure,[1] and whether shipments of stolen goods in interstate commerce may be aggregated as to value in order to meet the statutory minimum of $5,000, under 18 U. S. C. § 2314.[2] The indictment charged trans-

[1] Rule 8 (b) provides:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

[2] 18 U. S. C. § 2314 provides in relevant part:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

18 U. S. C. § 2311 provides so far as material here:

"'Value' means the face, par, or market value, whichever is the

portation in interstate commerce of goods known to have been stolen and having a value in excess of $5,000. It contained three substantive counts. Count 1 charged the two petitioners Schaffers and the three Stracuzzas (defendants below, who either pled guilty or were *nolle prossed* at trial) with transporting stolen ladies' and children's wearing apparel from New York to Pennsylvania. Count 2 charged petitioner Marco and the Stracuzzas with a similar movement of stolen goods from New York to West Virginia. Count 3 charged petitioner Karp and the Stracuzzas with like shipments from New York to Massachusetts. The fourth and final count of the indictment charged all of these parties with a conspiracy to commit the substantive offenses charged in the first three counts. The petitioners here were tried on the indictment simultaneously in a single trial. On motion of petitioners for acquittal at the close of the Government's case, the court dismissed the conspiracy count for failure of proof. This motion was denied, however, as to the substantive counts, the court finding that no prejudice would result from the joint trial. Upon submission of the substantive counts to the jury on a detailed charge each petitioner was found guilty and thereafter fined and sentenced to prison. The Court of Appeals affirmed the convictions, likewise finding that no prejudice existed by reason of the joint trial. 266 F. 2d 435. We granted certiorari. 361 U. S. 809. The allegations of the indictment having met the explicit provisions of Rule 8 (b) as to joinder of defendants, we cannot find clearly erroneous the findings of the trial court and the Court of Appeals that no prejudice resulted from the joint trial. As to the requirements of value, we hold that the shipment to a

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greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

single defendant may be aggregated. The judgments are therefore affirmed.

We first consider the question of joinder of defendants under Rule 8 (b) of the Federal Rules of Criminal Procedure. It is clear that the initial joinder of the petitioners was permissible under that Rule, which allows the joinder of defendants "in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." It cannot be denied that the petitioners were so charged in the indictment. The problem remaining is whether, after dismissal of the conspiracy count before submission of the cases to the jury, a severance should have been ordered under Rule 14 [3] of the Federal Rules of Criminal Procedure. This Rule requires a separate trial if "it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together . . . ." Under the circumstances here, we think there was no such prejudice.

It is admitted that the three Stracuzzas were the common center of the scheme to transport the stolen goods. The four petitioners here participated in some steps of the transactions in the stolen goods, although each was involved with separate interstate shipments. The separate substantive charges of the indictment employed almost identical language and alleged violations of the same criminal statute during the same period and in the same manner. This made proof of the over-all opera-

[3] Rule 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

tion of the scheme competent as to all counts. The variations in the proof related to the specific shipments proven against each petitioner. This proof was related to each petitioner separately and proven as to each by different witnesses. It included entirely separate invoices and other exhibits, all of which were first clearly identified as applying only to a specific petitioner and were so received and shown to the jury under painstaking instructions to that effect. In short, the proof was carefully compartmentalized as to each petitioner. The propriety of the joinder prior to the failure of proof of conspiracy was not assailed.[4] When the Government rested, however, the petitioners filed their motion for dismissal and it was sustained as to the conspiracy count. The petitioners then pressed for acquittal on the remaining counts, and the court decided that the evidence was sufficient on the substantive counts. The case was submitted to the jury on each of these counts, and under a charge which was characterized by petitioners' counsel as being "extremely fair." This charge meticulously set out separately the evidence as to each of the petitioners and admonished the jury that they were "not to take into consideration any proof against one defendant and apply it by inference or otherwise to any other defendant."

Petitioners contend that prejudice would nevertheless be implicit in a continuation of the joint trial after dismissal of the conspiracy count. They say that the resulting prejudice could not be cured by any cautionary instructions, and that therefore the trial judge was left with no discretion. Petitioners overlook, however, that the joinder was authorized under Rule 8 (b) and that subsequent severance was controlled by Rule 14, which provides for separate trials where "it appears that a

[4] A motion of petitioner Karp for a severance on grounds other than those tendered here was denied. 158 F. Supp. 522.

defendant . . . is prejudiced . . . by such joinder for trial . . . ." It appears that not only was no prejudice shown, but both the trial court and the Court of Appeals affirmatively found that none was present. We cannot say to the contrary on this record. Nor can we fashion a hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law. We do emphasize, however, that, in such a situation, the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. And where, as here, the charge which originally justified joinder turns out to lack the support of sufficient evidence, a trial judge should be particularly sensitive to the possibility of such prejudice. However, the petitioners here not only failed to show any prejudice that would call Rule 14 into operation but even failed to request a new trial. Instead they relied entirely on their motions for acquittal. Moreover, the judge was acutely aware of the possibility of prejudice and was strict in his charge—not only as to the testimony the jury was not to consider, but also as to that evidence which was available in the consideration of the guilt of each petitioner separately under the respective substantive counts. The terms of Rule 8 (b) having been met and no prejudice under Rule 14 having been shown, there was no misjoinder.

This case is not like *United States* v. *Dietrich*,[5] where a single-count indictment against two defendants charged only a single conspiracy offense, or *McElroy* v. *United States*,[6] where no count linked all the defendants and all the offenses. Neither is *Kotteakos* v. *United States*,[7] on which the petitioners place their chief reliance, apposite. That case turned on the harmless-error rule, and its appli-

[5] 126 F. 664.
[6] 164 U. S. 76 (1896).
[7] 328 U. S. 750 (1946).

cation to a serious variance between the indictment and the proof. There the Court found "it highly probable that the error had substantial or injurious effect." 328 U. S., at 776. The dissent agreed that the test of injury resulting from joinder "depends on the special circumstances of each case," *id.*, at 777; but it reasoned that the possibility was "non-existent" that evidence relating to one defendant would be used to convict another, and declared that the "dangers which petitioners conjure up are abstract ones." *Id.*, at 778. The harmless-error rule which was the central issue in *Kotteakos*, is not even reached in the instant case, since here the joinder was proper under Rule 8 (b) and no error was shown.

Petitioners also contend that, since the individual shipments with which they were connected amounted to less than $5,000 each, the requirements of the statute as to value were not present. However, it appeared at the trial that the total merchandise shipped to each petitioner during the period charged in the several counts was over $5,000, even though each individual shipment was less. The trial court permitted the aggregation of the value of these shipments to meet the statutory limit,[9] and it is this that is claimed to be error. A sensible reading of the statute properly attributes to Congress the view that where the shipments have enough relationship so that they may properly be charged as a single offense, their value may be aggregated. The Act defines "value" in terms of that aggregate.[9] The legislative history makes clear that the value may be computed on a "series of transactions."[10] It seems plain that the Stracuzzas and each of the petitioners were engaged in a series of trans-

[9] See note 2, *supra*.

[9] See note 2, *supra*.

[10] H. R. Rep. No. 1462, 73d Cong., 2d Sess., p. 2; H. R. Conf. Rep. No. 1559, 73d Cong., 2d Sess., p. 3.

actions, and therefore there is no error on that phase of the case.[11]

Petitioners in No. 122 further contend that certain of the prosecutor's remarks in his summation to the jury were improper and prejudicial. We agree with the treatment of this issue by the Court of Appeals, and see no need for further elaboration.

The judgments are therefore

Affirmed.

[11] This is not a case like *Andrews* v. *United States*, 108 F. 2d 511, where aggregation of shipments to a number of individuals was justified on the theory of a common design among the recipients. The instant case, unlike *Andrews*, involves aggregation of a number of shipments to a single defendant, and therefore it was quite unnecessary to justify aggregation on the theory of common design.

SUPREME COURT OF THE UNITED STATES

Nos. 111 AND 122.—OCTOBER TERM, 1959.

Max Schaffer and Norman Schaffer, Petitioners, 111 v. United States of America. Hyman Karp and Benjamin T. Marco, Petitioners, 122 v. United States of America.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 16, 1960.]

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE BRENNAN concur, dissenting.

The indictment in these cases charged violations of 18 U. S. C. § 2314 for transporting in interstate commerce goods known to have been stolen [1] and having a value in excess of $5,000.[2]

Counts 1, 2, and 3 were substantive counts. Count 1 charged the two Schaffers, petitioners in No. 111, together with three Stracuzzas, of transporting stolen ladies' and

[1] 18 U. S. C. § 2314 provides in relevant part:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

[2] 18 U. S. C. § 2311 provides so far as material here:

"'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

children's wearing apparel from New York to Pennsylvania between May 15, 1953, and July 27, 1953.

Count 2 charged Marco, one of the petitioners in No. 122, and the Stracuzzas with a similar movement from New York to West Virginia from June 11, 1953, to July 27, 1953.

Count 3 charged Karp, the other petitioner in No. 122, with a like shipment from New York to Massachusetts from May 21, 1953, to July 27, 1953.

Count 4 charged all the parties with a conspiracy to commit the substantive offenses.

Two of the Stracuzzas (who seemed to be the brains behind the various illegal transactions) pleaded guilty and received suspended sentences. The indictment against the third Stracuzza was disposed of *nol. pros.* The four present petitioners pleaded not guilty and were tried simultaneously in a single trial,[3] one of the Stracuzzas being the principal witness for the Government.

At the close of the Government's case the court dismissed the conspiracy count [4] for failure of proof. Indeed it does not appear even arguable that there was evidence linking all petitioners with each other in one conspiracy. Over objection the court continued the joint trial on the remaining substantive counts, instructing the jury that the evidence against each defendant was to be considered separately, the proof against one not to be used against another.

It is clear that but for the conspiracy count the joinder of these petitioners for similar but unrelated crimes would have been in error. Rule 8 (b) of the Federal Rules of Criminal Procedure allows joinder of defendants in the

[3] A motion of petitioner Karp for a severance was denied. 158 F. Supp. 522.

[4] A separate indictment charging a conspiracy between petitioner and others to violate 18 U. S. C. § 659 by receiving and concealing goods stolen in interstate commerce was also dismissed.

same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[3]

The Court of Appeals, while conceding that it would have been clearly erroneous to try petitioners together were it not for the conspiracy count, concluded that no showing of prejudice had been established and that the District Court did not abuse its discretion in denying separate trials.

I take a different view. I believe that once the conspiracy count was dismissed, the court had before it the same problem as would be presented if the prosecution had sought to try before a single jury separate indictments against defendants who had been charged with like crimes but which were wholly unrelated to each other.

Rule 8 (b)[4] contemplates joinder of defendants in two types of situations—first, where they participate jointly in one "act or transaction"; or second, where they participate "in the same series of acts or transactions constituting an offense or offenses." These four petitioners did not participate in one act or transaction as evidenced by the fact that the proof of conspiracy utterly failed. The other acts or transactions charged were not in the same "series," within the meaning of Rule 8 (b).

Mr. Justice Van Devanter, when circuit judge, in *United States* v. *Dietrich*, 126 F. 664, 670, said:

"Much can be said in support of a practice which, subject to a discretion invested in the court to enable

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[3] Rule 8 (b) provides:

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

[4] See note, 5, *supra*.

> it to do justice between the government and the accused, permits two or more defendants to be in separate counts of the same indictment severally charged with distinct and several offenses of the same class and grade, and subject to the same punishment, where the offenses appear to have been committed at the same time and place and to form parts of the same transaction. Under such circumstances the proof in respect to one offense would almost necessarily throw light upon the other or others, and the connection between them would frequently be so close that it would be difficult or impossible to separate the proof of one from the proof of the other or others."

McElroy v. *United States*, 164 U. S. 76, decided long before the present Rules, held it error to consolidate four indictments charging unrelated offenses (arson and assault with intent to kill) where six people were named in three of the indictments and only three of the six in the remaining one. The Court said the question of joinder or severance did not rest "in mere discretion"; that under those circumstances joinder was error as a matter of law:

> "[S]uch joinder cannot be sustained where the parties are not the same and where the offences are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions." *Id.*, at 81.

I think this is the sound rule and consistent with what Mr. Justice Van Devanter said in the *Dietrich* case. There must somehow be a nexus between the several

transactions charged against the several defendants, lest proof of distinct transactions blend to the prejudice of some defendants. The evidence concerning these petitioners was not in any proper sense of the words evidence concerning "the same series of acts or transactions" constituting an offense. The Schaffers had nothing to do with Karp's shipments to Massachusetts nor Marco's shipments to West Virginia; nor did the latter two have anything to do with Schaffer's shipments to Pennsylvania. The only possible connection between these disparate transactions was the fact that each petitioner dealt with the Stracuzzas who were the brains of these deals. But that was a happenstance which did not make petitioners any the less strangers to each other. The Pennsylvania, Massachusetts, and West Virginia shipments had nothing in common except they were all from the house of Stracuzza. Yet customers of one shop, engaged in an illegal enterprise, do not become participants "in the same series of acts or transactions," unless somehow or other what each does is connected up with the others or has some relation to them.

It is said that the joinder was proper if participation "in the same series" of transactions was "alleged" in the indictment. Such an allegation, to be sure, saves the indictment from attack at the preliminary stages. Yet once it becomes apparent during the trial that the defendants have not participated "in the same series" of transactions, it would make a mockery of Rule 8 (b) to hold that the allegation alone, now known to be false, is enough to continue the joint trial.

The Court in *Kotteakos* v. *United States*, 328 U. S. 750, 773, disapproved the bunching for trial of eight or more conspiracies related in kind "when the only nexus among them lies in the fact that one man participated in them all." Guilt with us remains personal. The "dangers of transference of guilt from one to another across the line

separating conspiracies, subconsciously or otherwise, are so great," said the Court in the *Kotteakos* case, "that no one really can say prejudice to substantial right has not taken place." *Id.*, at 774. A like danger of such transference existed in the present case. It is not enough to say that evidence of the guilt of each of the present petitioners may have been clear. Reasons for severance are founded on the principle that evidence against one person may not be used against a codefendant whose crime is unrelated to the others. Instructions can be given the jury and admonitions can be made explicit that the line between the various defendants must be kept separate. The district judge conscientiously made that effort here. But where, as here, there is no nexus between the several crimes, the mounting proof of the guilt of one is likely to affect another. There is no sure way to protect against it except by separate trials, especially where, as here, the several defendants, though unconnected, commit the crimes charged by dealing with one person, one house, one establishment. By a joint trial of such separate offenses, a subtle bond is likely to be created between the several defendants though they have never met nor acted in unison; prejudice within the meaning of Rule 14[1] is implicit.

This is unlike the case where the conspiracy count and the substantive counts are submitted to the jury, the verdict being not guilty of conspiracy but guilty on the other count. There is then no escape from the quandary in which defendants find themselves. Once the conspiracy is supported by evidence, it presents issues for the jury to

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[1] Rule 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

decide. What may motivate a particular jury in returning a verdict of not guilty on the conspiracy count may never be known.

Conspiracy presents perplexing problems that have long concerned courts. See *Krulewitch* v. *United States*, 336 U. S. 440; *Delli Paoli* v. *United States*, 352 U. S. 232. While it is proper at times to join a conspiracy count with substantive counts even where the latter are the same as the overt acts charged in the conspiracy count, *Pinkerton* v. *United States*, 328 U. S. 640, there is danger in any multiplication. The loose practice of trying to bring together into one conspiracy those whose ties are at best extremely tenuous has often been criticized.[8] We allow conspiracy to be put to new dangerous uses when we sanction the practice approved here.

I would reverse these judgments and remand the causes for new trials.

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[8] See Annual Report of the Attorney General for 1925, pp. 5–6; O'Dougherty, Prosecution and Defense Under Conspiracy Indictments, 9 Brooklyn L. Rev. 263; Developments in the Law: Criminal Conspiracy, 72 Harv. L. Rev. 920, 980–983; Note, Guilt by Association: Three Words in Search of a Meaning, 17 U. of Chi. L. Rev. 148; Note, The Conspiracy Dilemna: Prosecution of Group Crime or Protection of Individual Defendants, 62 Harv. L. Rev. 276; *United States* v. *Falcone*, 109 F. 2d 579, 581 (C. A. 2d Cir.); *United States* v. *Liss*, 137 F. 2d 995, 1003 (C. A. 2d Cir.) (dissenting opinion).